Volume 93
Issue 3 *The National Coal Issue*

Article 3

April 1991

A Study of Coal Arbitration under the National Bituminous Coal Wage Agreement between 1975- and 1990

Calvin William Sharpe
Case Western Reserve University

A STUDY OF COAL ARBITRATION UNDER THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT BETWEEN 1975 AND 1990

CALVIN WILLIAM SHARPE*

* Professor of Law Case Western Reserve University. The author is indebted to Steven W. Lindner, Department Head, UMWA Department of Contract Services; Michael Buckner, United Mine Workers Research Director; Robert Vines, Secretary/Treasurer and Vice President Health and Safety, Bituminous Coal Operators Association; and Joseph P. Brennan, President, Bituminous Coal Operators Association, for sharing insights and resources that were indespensible to the completion of this project. For helpful comments on the substance of the article, the author is grateful to Rolf Valtin and M. David Vaughn. The author also thanks Karen Ross Quinlan, Doug Tulin and Lori Acosta for valuable research assistance. The project was completed while the author was a Scholar-in-Residence at Arizona State University. It could not have been completed without the professional and friendly clerical assistance of Fran Kendall and her staff. Funding for this project consisted of a grant from Case Western Reserve University Law School.

I. INTRODUCTION

In many ways arbitration in the coal industry is a microcosm of arbitration in general. It addresses the same range of issues and, likewise, is the terminal point of a multi-step grievance procedure designed to resolve a variety of contractual claims. Yet, in important ways arbitration in the coal industry, notably under the National Bituminous Coal Wage Agreement (Agreement),[1] is *sui*

1. The Bituminous Coal Operators Association (BCOA) and United Mine Workers of America (UMWA) have had a collective bargaining relationship since 1950. The BCOA represents primarily eastern United States underground coal operators. The number of BCOA operators has declined from a high of 234 under the 1978 National Bituminous Coal Wage Agreement (Agreement) to 48 under the 1988 Agreement as of February 1988. The decline in the UMWA membership is due in large part to the westward movement of the coal industry by unorganized operators and the infusion of the industry with job-displacing technology. *See* President's Commission on Coal (PCOC), STAFF FINDINGS 51-53 (March 1980). The UMWA represents employees located in 30 states. Since its founding in

generis.[2] The hazardous working conditions, history of wildcat strikes and appellate arbitration structure have combined to make coal arbitration under the Agreement a unique system.

Statistics tell a dramatic story about unsafe working conditions in the coal industry. Underground coal mining historically has had one of the highest rates of disabling injuries.[3] While the majority of mine fatalities in underground mines have resulted from roof falls and haulage accidents,[4] many non-fatal underground injuries have resulted from machinery accidents and the handling of materials.[5] The most widely publicized cause of coal mine fatalities is the underground explosion, a phenomenon that was brought under control, though not totally eliminated, by the Coal Mine Health and Safety Act of 1969.[6] As the discussion below suggests, these unique safety concerns in the coal industry have permeated a range of arbitration issues.

Similarly, the grievance strike has distinguished the coal industry. Unauthorized work stoppages during the contract term, popularly

---

1890 in Columbus, Ohio, its membership has been as high as 500,000 before World War II to approximately 70,000 today. Interview with Steven W. Lindner, Director, UMWA Department of Contract Services, Mar. 1, 1991. The most recent Agreement executed by the parties was the Agreement of 1988, which became effective on Feb. 1, 1988 and will terminate on Feb. 1, 1993. References in this article to the Agreement are to the 1974, 1978, 1981, 1984, 1988 Agreements. Where necessary, the year of the Agreement will be specified. Unless otherwise indicated, quoted contractual terms are from the 1988 Agreement.

In many ways the Agreement sets the standard for the organized sector of the bituminous coal industry including those employers not covered by multi-employer bargaining. For example, under the 1984 Agreement there were 82 BCOA signatories and 2414 non-BCOA signatories; under the 1988 Agreement the figures were 51 and 1779. Letter from Steven W. Lindner, dated March 22, 1991.

2. The coal industry has experienced first depression after World War II, then tremendous growth in production beginning in the mid-60's and in employment beginning in the 1970's. *See* Appendix II. With this growth came an increase in negotiating and wildcat strike activity. Production itself in the industry began moving west in the 1960's, with western production accounting for 4% of the total in 1967 and more than 20% in 1979. Concurrently, underground mines lost their dominant share of mining production relative to surface mines, from 76.1% of all coal produced in 1950 to 37.9% of the total in 1979. Since organized labor, overwhelmingly the United Mine Workers of America, dominated only the underground mining industry, its share of total bituminous coal production has declined from 78.5% in 1951 to 52.1% in 1977 as Appendix III shows. THE ACCEPTABLE REPLACEMENT OF IMPORTED OIL WITH COAL, THE STAFF REPORT TO THE PRESIDENT'S COMMISSION ON COAL 46-52 (1980).

3. *See* Appendix IV.

4. *See* PCOC, STAFF REPORT, 35.

5. *Id.* at 36.

6. *See* PCOC, STAFF REPORT, 36-38 and Appendix V.

known as wildcat strikes, have historically plagued the mining industry.[7] Among members of the Bituminous Coal Operators Association (BCOA) alone an average of 1500 annual wildcat strikes occurred between 1971 and 1974.[8] That rate doubled to 3000 per year during the 1975 to 1977 period.[9] Researchers have speculated that the inordinate number of unauthorized strikes in the organized coal industry was due in part to the ineffectiveness of grievance procedures in resolving disputes.[10] Indeed, a study published by Jeanne N. Brett and Stephen B. Goldberg in 1979 suggested that miners lacked confidence in grievance procedures and believed that strikes helped to resolve grievances in the miners' favor.[11]

Against this backdrop the Arnold Miller administration of the United Mine Workers of America (UMWA) negotiated a grievance procedure in the 1974 Agreement designed to substantially reduce delay in grievance processing and institute employee confidence in the procedure.[12] The pre-1974 arbitration system suffered from a trio of defects: excessive arbitration, inconsistency in arbitration awards and a broad variability in the quality of arbitrators.[13] The Arbitration Review Board (ARB),[14] established by the 1974 Agree-

---

7. *See* Appendix VI, which shows the number of workdays and amount of tonnage lost to wildcat strikes in the bituminous coal industry between 1956-1979.

8. Brett and Goldberg, *Wildcat Strikes in Bituminous Coal Mining*, 32 INDUS. & LAB. REL. REV. 465 (1979).

9. *Id.*

10. *Id.* This undisciplined strike activity has also been attributed in part to the onset of democratic reform within the union, ushered in by the administration of Arnold Miller. *See* P. CLARK, THE MINER'S FIGHT FOR DEMOCRACY 63. Five times more wildcat strikes have occurred in unionized coal fields than in other industries. PRESIDENT'S COMMISSION ON COAL, COAL DATA BOOK 144 (1980) [hereinafter PCOC, COAL DATA BOOK].

11. Brett and Goldberg, *supra* note 8, at 477-79.

12. The Agreement of 1974 deleted a step in the grievance procedure and instituted the ARB. Appendix VI outlines the grievance procedures found in the Agreement. *See* P. Clark, *supra* n.10, 73-4.

13. *See* Bourne, *The Rise and Fall of the Arbitration Review Board*, 1988 LAB. L.J. 470 (1988) (wherein the author points out that a reason for the inconsistency was the parties' policy against circulating arbitration decisions and, thus, making available to arbitrators only those decisions that supported a party's position; he also noted that arbitrators were selected on an ad hoc basis rather than through the American Arbitration Association or the Federal Mediation and Conciliation Service).

14. The ARB was established by the 1974 Agreement and survived until the end of the 1978 Agreement. The 1974 ARB was a tripartite Board, one union representative, one employer representative, and one umpire that heard appeals from panel arbitration awards alleged to conflict with other awards, involve novel and substantial questions of contract interpretation, or be arbitrary, capricious

ment, purported to repair the arbitration system by bringing consistency and reliability to the decision making process through arbitral review.[15] To control arbitral quality the 1974 Agreement also established district panels of arbitrators who would hear cases in the first instance.[16] Reflecting the procedure's purpose of bringing consistency and reliability to the arbitration process, appeals to the ARB were permitted when panel arbitrator decisions on the same issue

---

or fraudulent. *See infra* notes 16-17.

Of the approximately 750 appeals to the ARB under the 1974 Agreement, the ARB issued only 126 decisions. The low output has been attributed to the ARB's comprehensive review, lack of screening and member turnover. *See* Bourne, *supra* note 13, at 472 relying upon Valtin memorandum, *infra*, n. 18. Under the 1978 Agreement, the volume of ARB cases was reduced through the removal of the "arbitrary and capricious" basis for appeal and the adoption of a one-member Board format to replace the three-member Board. *Id.* at 473. Interview with Steven W. Lindner *supra* note 1.

The Arbitration Review Board was discontinued after the expiration of the 1978 Agreement. Starting with the 1981 Agreement, the parties in Article XXIII(k) gave precedential effect to "[a]ll decisions of the Arbitration Review Board rendered prior to the expiration of the National Bituminous Coal Wage Agreement . . . to the extent that the basis for such decisions have [sic] not been modified by subsequent changes in [the] Agreement." This provision has contributed to the continuing uniformity of coal decisions. ARB members during the 1974 Agreement were Robert C. Benedict (UMWA), Tom F. Waddington (Employer) and Rolf Valtin (Chief Umpire). This Board decided cases 1 - 126. Under the 1978 Agreement the parties changed to a single umpire system, cases 78-1 to 78-33 being decided by Paul L. Selby Jr. and 78-34 to 78-81 being decided by Richard I. Bloch as Chief Umpires. An Interim Board operating after the expiration of the 1974 Agreement and before the onset of the 1978 Board substituted Thomas M. Phelan as Chief Umpire and retained the party members of the 1974 Board. The interim Board decided non-precedential decisions 127-415.

15. *See* Borne, *supra* note 13, at 471.

16. Article XXIII, Section (b) of the 1974 Agreement reads:

> 1. Within the 60 days following the effective date of this Agreement, the United Mine Workers of America and the Bituminous Coal Operators' Association will establish an Arbitration Review Board composed of one representative of the UMWA, one representative of the Employer and a chief umpire to be jointly selected by both parties. This 60-day period may be extended by mutual agreement.
>
> 2. The chief umpire jointly selected by the parties shall serve for the balance of the Agreement, unless removed by formal resolution adopted by either the International Executive Board of the United Mine Workers of America or the Board of Directors of the Bituminous Coal Operators' Association.
>
> 3. In the event of removal, resignation, death or incapacity of the chief umpire, the president of the UMWA and the president of the B.C.O.A. shall endeavor to select a mutually acceptable successor within 15 days. In the event the parties fail to agree, they shall request the aid of the Federal Mediation and Conciliation Service in selecting a mutually acceptable successor. The composition may be considered by the parties at the time when renewal agreements are being negotiated.
>
> 4. The presidents of the UMWA, International Union and the B.C.O.A. shall jointly establish a panel of impartial arbitrators for each UMWA district. These panels may be changed, augmented or supplemented by mutual consent of the appointing parties. Arbitrators may be removed from a panel by either party upon 10 days advance written notice.

conflicted, substantial contractual issues were at stake or the decision was asserted to be tainted by arbitrary, capricious or fraudulent conduct.[17]

However, because of the parties' failure to establish operational guidelines for the ARB, it experienced implementation problems and did not review its first appeal until fourteen months after the effective date of the 1974 agreement when it faced a backlog of 400 appeals. Having started on the wrong foot, the ARB encountered dissatisfaction from the parties and was discontinued after the expiration of the 1978 Agreement.[18] While the ARB issued only 207 decisions during its seven year tenure,[19] available evidence shows that the ARB was influential in producing greater consistency in arbitral decision making under the Agreement.[20] The residual influence of ARB decisions has continued and increased since the expiration of

---

17. Article XXIII, Section (c) reads in part:

5. Either party to an arbitration, upon receiving a final award by a panel arbitrator, may petition the Arbitration Review Board to appeal the decision of the panel arbitrator. Such petition shall include a statement of the grounds for the appeal, which shall consist of one of the following:

(i) That the decision of the panel arbitrators in conflict with one or more decisions on the same issue of contract interpretation by other panel arbitrators.

(ii) That the decision involves a question of contract interpretation which has not previously been decided by the Board, and which in the opinion of the Board involves the interpretation of a substantial contractual issue.

(iii) That the decision is arbitrary and capricious, or fraudulent, and therefore must be set aside.

Upon receipt of such petition, the Arbitration Review Board shall review the decision of the panel arbitrator to determine whether grounds for appeal exist. If not, the Board will so inform the parties. If so, the Board shall review the decision of the panel arbitrator making whatever changes are necessary to assure that the final decision correctly resolves all contractual questions and issues presented, and is consistent with prior decisions of the Board. The Board's decision shall be made by majority vote, and shall issue its decision within 15 days. Following review, the Board shall consign its decision and transmit a copy to each party.

18. *See* Bourne, *supra* note 13, at 471-74, relying on Valtin, "Memorandum to Arnold Miller and Joseph Brennan," dated Nov. 8, 1977.

19. *Id.* at 472. The interim ARB issued 289 non-precedential decisions after the expiration of the 1974 Agreement but before the 1978 Agreement. Interview with Steven W. Lindner, *supra* note 1. This number is relatively small given the excessive arbitration of grievances, 1,000 per year under the 1974 and 1978 Agreements, appealed at a 10% rate yielding about 600 appeals under the 1974 and 1978 Agreements alone. *See id.* at 472-73 for a discussion of the reasons for the low number.

20. *Id.* at 474-75.

the 1978 Agreement.[21] This is due in part to the following provision found in the 1981 and subsequent Agreements:

> Article XXIII SETTLEMENT OF DISPUTES
>
> Section (k) Prior Agreement
>
> All decisions of the Arbitration Review Board rendered prior to the expiration of the National Bituminous Coal Wage Agreement of 1978 shall continue to have precedential effect under this Agreement to the extent that the basis for such decisions have [sic] not been modified by subsequent changes in this Agreement.

The 126 awards decided under the 1974 Agreement and 81 awards decided under the 1978 Agreement have precedential effect and have been followed by virtually 100% of the panel arbitrators.[22] Remarkable is the residual impact of ARB precedents, reflected in the increasing adherence of panel arbitrators to those decisions since 1981.[23]

In this paper the author has undertaken a study of the coal decisions published by the Bureau of National Affairs and Commerce Clearing House, the two principal publishers of arbitration awards, during the fifteen-year period between 1975 and 1990. This fifteen-year period encompasses virtually the entire experience of the BCOA and UMWA under the ground breaking Agreement of 1974.[24] The study will observe some basic statistical trends in the published cases.[25] It will also seek to summarize substantive developments under the provisions of the 1974, 1978, 1981, 1984 and 1988 Agreements.[26] It is anticipated that the paper will be used as a

---

21. *Id.*

22. *Id.* at 475. .

23. *Id.* The parties have also experimented with grievance-mediation, whose success has been documented in a substantial experiment conducted with noteworthy success. *See* Brett and Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 INDUS. & LAB. REL. REV. 49 (1983). The letter of mediation, dated Oct. 1, 1984, and contained in the 1988 Agreement, reflects the parties openness to the continued the use of this procedure.

24. *See supra* notes 12-15 and accompanying text for a discussion of major changes brought on by the 1974 Agreement.

25. *See infra* note 30.

26. Because the Agreement has not been substantially changed since the 1974 negotiations, references in this article to contractual provisions will not identify the year of the Agreement unless there is a special reason to do so. Generally, unless otherwise noted, quoted language will be taken from the 1988 Agreement.

comprehensive treatise of arbitral developments under the new contractual regime.

II. The Published Cases

Between January 1975, and January 1990, the Bureau of National Affairs and the Commerce Clearinghouse published a total of 368 arbitration awards in *Labor Arbitration Reports* and *Labor Arbitration Awards*, respectively, involving signatories to the Agreement.[27] Generally, employer signatories were also members of the BCOA; however, a number of signatory mine operators were non-BCOA members.[28] Indeed, the number of companies authorizing BCOA representation has declined from 154 listed under the 1974 agreement to 48 listed under the 1988 agreement.[29]

Of the 368 published awards[30] Discipline and discharge cases occurred most frequently. During the fifteen year period of this study

---

27. The only case falling outside this period but included in the study is Arch of West Virginia and United Mine Workers of America, District 17, Local 5958, 94 Lab. Arb. (BNA) 503 (1990) (Feldman, Arb.), decided on Feb. 28, 1990.

28. For example, under the 1984 Agreement there were 82 BCOA signatories and 2,414 non-BCOA signatories; under the 1988 Agreement there were 51 BCOA and 1,779 non-BCOA signatories. Letter from Steven W. Lindner (Mar. 22, 1991).

29. This count includes companies and subdivisions. *See* Agreement of 1974, 132-35, Agreement of 1988, 244-45. The listed companies may not correspond to number of signatories, since companies sometimes have more than one signatory.

30. *See* Appendix I. Of course, the published cases represent only a small percentage of cases actually decided during the study period. If the general publication percentages of BNA and CCH hold true for the coal industry, the 368 published cases represent roughly approximately 2,500 to 3,600 decisions filed for publication during the study period. This estimate is based on data showing that between 1975 and 1990 CCH published a low of about 8% of the cases submitted for publication (1981) and a high of about 19% (1990). Letter, Robert F. Bezouska, Manager, Editorial Library, Commerce Clearing House, Inc. While comparable specific data are not available from BNA, generally BNA published 10-15% of its cases per year.

In addition to the decisions that are sent to BNA and CCH but not published there is an internal network of unpublished arbitration awards that are collected by agents for the BCOA and UMW. There are more than 20,000 such decisions on file. Through a centralized numbering system and the indexing of contractual provisions the parties may regularly retrieve and cite unpublished awards to arbitrators deciding coal cases. It should also be noted that a number of able panel arbitrators do not submit their awards for publication. Interview with M. David Vaughn, April 30, 1991.

Indeed, the frequency of issues represented in published cases may not mirror their actual frequency. For example, BNA excludes three categories of cases from publication because of their limited utility to readers: (1) credibility cases, (2) cases where factual uniqueness precludes the general application of the award, and (3) cases involving "routine" principles. *See* 93 Lab Arb. (BNA) v-vi (1990). Yet, the sixteen general categories of reported issues provide a good sampling of arbitral thinking on many important issues that arise under the Agreement. Thus, they have been an excellent source of raw data about arbitral developments during the fifteen years since the ground- breaking 1974 Agreement.

74 of the 368 cases, or approximately 20% of the awards, involved discharge and discipline issues.[31] Fifty-eight, or approximately 16%, dealt with work assignment issues. About 52% of the work assignment issues involved subcontracting, which apparently increased rapidly in importance for the parties in early 1978.[32] As the table in Appendix I indicates, an equally popular issue was compensation. Even though a variety of questions fall into this category, surprisingly the birthday holiday pay issue predominated constituting about 21% of the compensation disputes.[33] The following issues in declining order also arose with some frequency: seniority (14%), hours (8%), safety (5%), work rules (4%), health (4%), procedure (3%), management rights (2%), working conditions, arbitrability, successorship, discrimination, union security and miscellaneous issues (each accounting for 2% or fewer of the published cases).

In the issue categories where a significant number of disputes arose during the period covered by the study,[34] the union was most successful in challenging supervisory performance of unit work. In those cases arbitrators sustained grievances about 64% of the time. Yet, the work assignment category containing the unit work issue featured 58 cases and an overall grievance success rate of only 41%. In the more popular discipline and discharge area the union won approximately 61% of the 74 published cases. Employers, on the other hand, were most dominant in procedural disputes, winning approximately 80% of the cases. In the work assignment category, employers won 61% of the cases, faring particularly well (68%) in subcontracting disputes. Employers also did well on issues dealing with scheduling (71%), seniority (71%) working conditions (63%), arbitrability (63%), safety (56%), health (54%) and compensation (52%).

A. Discharge and Discipline

Procedural idiosyncracies and industry specific characteristics make some discipline and discharge issues in the coal industry dis-

31. The dominant discharge and discipline issue, attendance, occurred in 22 of the 74 (29.7%) cases.

32. Thirty of the 58 work assignment cases involved subcontracting.

33. Twelve of the 58 compensation cases involved birthday holiday pay.

34. Significant is defined here as a category where five or more cases arose during the study period.

tinct. For example, the ARB announced general rules governing attendance.[35] Without such general and binding rules arbitral jurisprudence on the attendance issue would have developed along conflicting lines of authority that would make the selection of an arbitrator outcome determinative.[36] Similarly, the industry's unique concern with safety and unauthorized strike problems has left its imprint on discipline cases. Other issues, such as drugs and alcohol and insubordination, are common to all industries, yet raise special concerns under the Agreement because of industry characteristics.

1. Attendance

The attendance issue accounts for the largest number of Discipline and Discharge Cases.[37] Grievants won about 55% of the published discharge and discipline cases involving attendance issues during the study period.[38]

Even though the ARB became extinct upon the expiration of the 1978 Agreement, as noted above, the 1981 and subsequent Agreements in Article XXIII, Section (k) gave precedential status to ARB decisions arising under the 1974 and 1978 Agreements. Thus, many ARB decisions continue to have vitality.

An example of how ARB decisions influence arbitral decision making in attendance cases is found in *AMAX Coal Co. and United Mine Workers of America District 11, Local 1907.*[39] In that case the grievant had a remarkable record of excessive absenteeism related to various periods of disability that were proved by physician statements. The company instituted an absentee control program to counsel and discipline employees with serious absentee problems. The grievant was placed into the program and ultimately discharged for failing to meet the goals of the program. Two contractual provisions that were relevant to this case were Article XXII, Section (i) con-

35. *See infra* notes 39-40 and accompanying text.

36. *See* Appendix VII.

37. Twenty-two of the 74 discipline and discharge cases or (approximately 30%) involved attendance.

38. The grievant won 12 of 22 (55%) of the attendance cases.

39. 85 Lab. Arb. (BNA) 225 (1985) (Kilroy, Arb.).

taining a standard attendance control program and Article XI, Section (c) containing a sickness and accident benefits plan. The latter was established to protect employees against financial hardship resulting from sickness or accident suffered on or off the job. The union argued that the grievant's receipt of benefits under Article XI excused her disability related absences and insulated her from discipline. The union also argued that the company was precluded from using its own absentee control program in lieu of the standard attendance control program contained in Article XXII(i). Drawing heavily upon ARB No. 78-25 the arbitrator rejected both arguments. ARB No. 78-25 specifically limited "proven sickness" as a defense to the Standard Attendance Control Program set forth in Article XXII, Section (i). The arbitrator said that "proven sickness" could not prohibit discipline for absenteeism under other provisions of the agreement. The arbitrator also quoted other general pronouncements contained in ARB No. 78-25 specifically permitting illness related absences to be used in determining excessive absenteeism unless a company's specific absentee control programs permit the disciplinary exemption of such related absences. The ARB decision goes on to create a presumption in favor of counting illness related absences toward excessive absenteeism unless contractually exempted. Because the company's October 1983 Absentee Control Program in *AMAX* had not exempted "proven sickness," the arbitrator found that the company had properly counted these absences and discharged the grievant for just cause.[40]

In attendance cases the proof of sickness clause of the Standard Attendance Control Program has generated the most controversy. Article XXII, Section (i)(4) excepts "proven sickness" from the serious penalty for being absent from work two consecutive days without the consent of the employer. The attendance question that arises

40. Other awards applying ARB No. 78-25 as binding precedent in attendance cases are: North River Energy Co. and United Mine Workers of America, District 20, 88 Lab. Arb. (BNA) 447 (1987) (Witney, Arb.) (where the arbitrator found under the company's policy that absences resulting from a job related injury do not count against an employee for purposes of discipline); Drummond Co., Inc. and United Mine Workers of America, District 20, 87-1 ARB ¶ 8157 (1986) (Feldman, Arb.) (where the arbitrator referenced ARB No. 78-25 in finding that a preceding arbitration award should not be res judicata in that case).

most frequently is whether an employee has produced sufficient proof of illness to be excused from absences under the standard attendance control program of Article XXII, Section (i).

Section (4) of that article provides as follows:

> (4) Absences of Two Consecutive Days
>
> When an employee absents himself from his work for a period of (2) consecutive days without the consent of the Employer, other than because of proven sickness, he may be discharged.

The employee bears the burden of proving the absence was caused by illness.[41] Arbitrator Donald S. McPherson found in *Beth Energy Mines, Inc., 84 Complex and United Mine Workers of America, District 5, Local Union 1197*[42] that the grievant had not met his burden of proving illness by simply relying upon a proven record of psychological illness, especially where current medical evidence did not indicate illness and the grievant had not sought treatment during the period of his absence.[43] Similarly, Arbitrator Feldman found insufficient proof of illness, where the employee produced only subjective evidence of pain not based upon any objective medical findings.[44]

An excusable illness under Article XXII, Section (i) is not simply a condition that is related to an illness; rather, "it refers to a condition of illness which renders an employee physically unfit for work."[45] Though a medical excuse covering the period of absence is the best proof of illness, arbitrators will examine the entire record to determine whether there is sufficient proof of illness. Often such

---

41. *See* Beth Energy Mines, Inc., Eighty-Four Complex and United Mine Workers of America, District 5, Local Union 1197, 85-2 ARB ¶ 8628 (1985) (McPherson, Arb.).

42. *Id.*

43. In Jim Walter Resources, Inc., Blue Creek No. 3 Mine, Atger, Alabama and United Mine Workers of America, District 20, Local No. 1928, 79-1 ARB ¶ 8237 (1979) (Clarke, Arb.) the arbitrator found that the grievant had failed to meet his burden of proving illness where his proof of narcotic addiction and reactive depression only covered some and not all of the days of absence.

44. *See* Quarto Mining Co. and United Mine Workers of America, District 5, Local Union 1941, 84-1 ARB ¶ 8183 (1984) (Feldman, Arb.).

45. *See id.* at 3986 (citing North American Coal Corporation, Powhatan No. 3 Mine and United Mine Workers of America, Local Union 2262, ARB No. 6-77-763 (1977) (Dworkin, Arb.), *aff'd* ARB Dec. No. 128 (Mar. 2, 1978)). *See also* United Mine Workers of America, Local Union No. 6023 and Allied Chemical Corp., Semet-Solvay Division, 78-1 ARB ¶ 8006 (1977) (Dyke, Arb.).

proof takes the form of evidence corroborating the grievant's subjective complaints or other indications of illness.[46]

Although a company may ultimately reject a questionable medical excuse, it cannot reject a medical excuse without evidence that tends to establish its fraudulence or inaccuracy.[47] Arbitrator David T. Kennedy has suggested the following procedure, where "a Company has a reasonable basis to challenge an excuse":

> If an employer has reasonable cause to question an excuse which has been presented, the employer should put the employee to work under protest and then investigate the doubtful excuse. If the excuse turns out to be genuine, the Company and employee have not been harmed because the employee has been allowed to work. If it turns out to be fraudulent in some way, the Company can proceed to take such action as it feels is warranted . . .[48]

The Company may reject a grievant's medical excuse, however, if other evidence shows that illness was not the reason for the grievant's absence.[49]

2. Safety Cases

As noted in Section I, the mining industry has historically had a special concern about safety issues. This concern has found congressional expression in the Federal Mine Safety and Health Act.[50]

---

46. *See* Jim Walter Resources, Inc., and United Mine Workers of America, District 20, Local Union 2397, 85-1 ARB ¶ 8283 (1985) (Feldman, Arb.) (wherein the arbitrator found sufficient proof of illness in the grievant's statement that he was in severe back pain during the period of absence, that he took pharmaceuticals during the entire period, that he visited an emergency room, because of excruciating back pain, that he visited a doctor's office during the period even though he was unable to secure treatment, that his back problems were a continuing problem and not simply an isolated episode, and that he kept an appointment at the end of the absence period with his treating physician; the arbitrator found that this evidence cumulatively constituted proof of illness under Article XXII).

47. Crystal Coal Company and United Mine Workers of America, 84-1 ARB ¶ 8046 (1983) (Stoltenberg, Arb.).

48. *See id.* at 3200.

49. *See* AMEX Coal Co., Chinook Mine and United Mine Workers of America, Local Union No. 1216, 83-1 ARB ¶ 8279 (1983) (Witney, Arb.) (wherein the arbitrator looked beyond and rejected the grievant's medical excuse, finding that he would have worked, had he not been arrested and detained in jail).

50. 30 U.S.C. § 801 (1977). Current events show that safety concerns continue to be a contentious issue in the industry. *See U.S. to Fine Coal Companies $5 Million for Safety Violations on Dust Samples*, The Washington Post, April 5, 1991, at A9.

Similarly, mining states have passed their own laws regulating the hazards of mining.[51] Recognizing the importance of safety concerns the parties in Article III of Agreements from 1974 through 1988 have affirmed the right of employees to a safe and healthful work place. They have affirmed also their own responsibilities, obligations and duties under federal and state mine safety and health laws.[52] Under Article III the parties have resolved to cooperate among themselves and with federal and state officials to improve mining safety and health.[53]

Companies also use Article III to justify discipline including discharge of employees. These cases typically involve alleged employee conduct that violates federal or state law and may turn on whether the employee actually engaged in the conduct.[54] Other cases involve the question of whether an employee can properly be held responsible for violating safety and health laws.[55]

The most difficult safety cases involve a charge of insubordination, where the employee has asserted his safety rights. In these cases the employer's right to discipline confronts the employee's con-

---

51. *See, e.g.*, W. VA. CODE § 20-3-10 (1982).

52. Article III of the Agreement provides in part:

Section (b) Federal Mine Safety and Health Act of 1977, As Amended.

The parties to this contract, finding themselves in complete accord with the FINDINGS AND PURPOSE declared by the United States Congress in section 2 of the Federal Mine Safety and Health of 1977 do hereby affirm and subscribe to the principles as set forth in such [sic] section 2 of the Act.

(1) In consequence of this affirmation, the parties not only accept their several responsibilities, obligations and duties imposed by the Federal Mine Safety and Health Act, but freely resolve to cooperate among each other and with the responsible officials of federal and state governments in determined efforts to achieve greatly improved performance in coal mine health and safety.

(2) Neither party waives nor repudiates any administrative, procedural, legislative, or judicial rights under or relating to the Federal Mine Safety and Health Act of 1977, as amended.

53. *Id.*

54. *See, e.g.*, Consolidation Coal Co., Robinson Run Mine, Jones Run Portal and United Mine Workers of America, Local No. 1501, District No. 31, 82-2 ARB ¶ 8600 (1982) (Stoltenberg, Arb.) (where the arbitrator resolved against the grievant a credibility dispute about whether the grievant was smoking inside a mine in violation of federal law).

55. *See, e.g.*, North American Coal Corp. and United Mine Workers of America, District 6, Local No. 1810, 85 Lab. Arb. (BNA) 1095 (1985) (Talmadge, Arb.) (where the arbitrator found that a miner helper could not be held equally responsible with the mining machine operator for a long or deep coal cut that violated the federal safety law).

tractually guaranteed right to a safe working environment. Article III, Section (i) provides as follows:

> Section (i) Preservation of Individual Safety Rights.
>
> (1) No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an Employee in good faith believes that he is being required to work under such conditions he shall immediately notify his supervisor of such belief and the specific physical conditions he believes exist. The Employee shall state the factual basis for his belief but shall not be required to cite applicable law or regulation. Unless there is a dispute between the employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary employees including the involved Employee.

Quite apart from the safety rights contained in the preceding section of the Agreement, a well-settled principle of arbitral jurisprudence gives an employee the right to refuse to carry out a work assignment if he believes that the assignment entails an undue risk to his health and safety.[56] Thus, employees asserting their safety rights in defense of a charge of insubordination are often viewed by arbitrators as having two contractual bases — the "just cause" provision (Article XXIV(a)) and the safety rights provision (Article III, Section (i)). An employee failing to comply with Article III, Section (i) by immediately notifying his supervisor or specifying the factual basis for his belief may still be saved by Article XXIV(a) of the Agreement on the theory that discipline and discharge would be without just cause.[57]

Employees are also susceptible to discipline for unsafe performance as prescribed by company rules that are not inconsistent with state and federal laws.[58] Additionally, safety concerns may figure

56. *See* Peabody Coal Co., No. 7 Montcoal Mine and United Mine Workers of America, District 17, Local 6608, 87 Lab. Arb. (BNA) 1002 (1986) (Volz, Arb.) (citing Allied Chemical Corp., 66-3 ARB ¶ 9022 (1966) (Hilpert, Arb.)). *See also, e.g., Jacksonville Shipyards, Inc.*, 79 Lab. Arb. (BNA) 587 (1982) (McCollister, Arb.).

57. Peabody Coal Co., No. 7, Montcal Mine and United Mine Workers of America, District 17, Local 6608, 87 Lab. Arb. (BNA) 1002 (1986) (Volz, Arb.).

58. *See* Agreement, Article III, § (g).

into arbitral review of terminations for unsatisfactory performance.[59] Arbitral sensitivity to mine safety issues may render arbitrators less sympathetic to the plight of employees disciplined for performance problems.

A special status is enjoyed by members of the Mine Health and Safety Committee (MHSC).[60] This status affects the company's authority to discipline employees for safety violations. Article III, Section (d) of the Agreement mandates a MHSC made up of experienced and trained miners and selected by the local union to inspect the mine and make recommendations to the employer, should it discover conditions that endanger the lives and bodies of the employees. Section (d)(5) of Article III also is an immunity provision that prevents an employer from suspending or discharging committee members for official actions. This often means that employers' attempts to characterize the actions of MHSC members as insubordinate or violations of safety rules are frustrated. For example, in *Consolidation Coal Co. and United Mine Workers of America, District No. 6, Local 1110*,[61] a committee member successfully challenged his disciplinary suspension for insubordination and violation of company safety rules when he conducted an inspection in a "dangered-off" area despite the supervisor's instructions not to do so. In response to the company's argument that the immunity clause prevented discipline only for a member's improper closure of the mine, the arbitrator said the following:

> An analysis of the entire text persuades the arbitrator that clause (5) was intended to provide disciplinary immunity for the full range of committee member conduct, leaving removal from the committee as the only remedy which the company might pursue in the event a member operated arbitrarily to close down an area of the mine, an act obviously of enormous economic consequences to an employer.[62]

Grievants won about 61% of the published discharge cases involving safety concerns. This percentage reflects concurrent tenden-

59. *See, e.g.*, Harrison & Western Corp. and United Mine Workers of America, District 30, 66 Lab. Arb. (BNA) 1067 (1976) (Cantor, Arb.) (where the arbitrator upheld the termination of an employee from a job due to an inability to perform the job; the arbitrator made it clear that mine safety was an important factor in his decision).

60. *See* Agreement, Article III, Section (d).

61. 78 Lab. Arb. (BNA) 473 (1982) (Ruben, Arb.).

62. *Id.* at 479.

cies to permit the use of safety rights as an employee shield while denying their use as an employer sword.

3. Work Stoppages

As already noted, peculiar to the mining industry is a history of settling grievance disputes through work stoppages.[63] Indeed, under the settlement of disputes provision, Article XXIII, of the Agreement from 1974 to the present the union has not explicitly agreed to refrain from striking during the term of the agreement.[64] Yet, the Supreme Court in *Gateway Coal Co. v. United Mine Workers*,[65]

---

63. *See also* United States Steel Corp., Frick Coal District, Maple Creek Mine and United Mine Workers of America, District 5, Local 1248, 65 Lab. Arb. (BNA) 15 (1975) (Garrett, Arb.) (making the point that the numerous unauthorized work stoppages at the mine evidenced the miners' lack of confidence in the grievance procedure).

64. Union officials attribute the absence of a clear no-strike promise in the agreement to the membership's "no contract, no coal" policy. The strike right is jealously guarded to the point where the leadership is convinced that the membership would never agree to a no-strike clause. Several provisions of the Agreement, in addition to the missing no-strike clause in Article XXIII, reflect the parties' acceptance of the strike prerogative and recognition of the overall strike problem. *See, e.g.*, Article XI § (c) (denying disability benefits where the disability occurs during a strike or work stoppage but not where it occurs before a strike or work stoppage). *See also* Article XII § (e) (disqualifying an employee from receiving the benefits of holiday pay where an absence before or after the holiday is due to an unauthorized work stoppage, as distinguished from the typical disqualification for any absence on the days immediately before or after the holiday). Interview with Steven W. Lindner, *supra* note 1. *See also* P. Clark, *supra* note 10 at 63-64.

65. 414 U.S. 368 (1974). *See also* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). Under the leadership of Chief Umpire Rolf Valtin the ARB recognized in ARB No. 108 (1977) that the Agreement imposes a no-strike obligation on the Union in Articles XXIII and XXVIII, even though no explicit no-strike promise exists, noting:

> [A]n Agreement which *mandates* the use of the disputes-settling machinery ending in arbitration and which nonetheless permits resort to strike or lockout action over disputes which are subject to referral to the machinery would add up to a self-contradition. ARB No. 108, p. 6.

While setting forth a historical perspective on the role of arbitration in American labor relations, focusing particularly on its benefit to employees, the ARB also noted the unique circumstances of the coal industry. *Id.* at 9-14. It acknowledged the relatively depressed state of labor relations in the industry and discussed the need for a systematic settling of grievances in arbitration and without resort to the use of economic pressure. *Id.* at 13-16. The ARB indicated its intent to apply a substantive rather than formal approach to the factual question of whether picketing has occurred, one that would cover the employees in that case who were simply observed in the vicinity of the targeted mines without signs. *Id.* at 16-18. Though tempered by due process and equal protection concerns, the ARB announced the following rule:

> [W]e lump picketing with strike instigation and other strike-leadership manifestations as being of the same gravity. They constitute a capital offense—by which we mean an offense which itself warrants discharge and which Management therefore need not treat as an offense

held that the existence of a grievance procedure implies a no strike obligation. Thus, grievance strikes are not sanctioned under federal labor law. They are also unauthorized, if neither the union nor the contract has sanctioned such work stoppages.[66]

The parties do agree in Article XXVII that disputes not settled by agreement "shall be settled by the machinery provided in the 'Settlement of Disputes' Article of [the] Agreement."[67] They also agree to maintain the integrity of the contract without resort to courts.[68] Even that agreement is qualified by the permission to use "free collective bargaining as heretofore practiced in the industry" where the dispute is national in character.[69]

Picket lines associated with work stoppages are particularly effective in the mine industry, because of the tradition of loyalty and brotherhood among miners and respect for the picket line.[70] Thus, picketing creates a major production concern among mine operators, hence an occasion for discipline.

About seven percent of the discipline and discharge cases published between 1975 and 1990 involved unauthorized work stoppages. These cases arise against the historical backdrop of the grievance

---

calling for the application of progressive discipline. *Id.* at 17-18.

In view of the ARB's radical departure from the tradition of miner strike prerogative, tacitly recognized by management and the union, the ARB closed its decision with the following comment:

> We have proceeded with awareness of the Miners' lot in relation to that of most others in our society and with understanding of the origins of the Miners' repeated recourse to picketing and strikes. But we cannot at once be faithful to our role under the Agreement and permit defiance of the grievance procedure. There is no choice for us on this score. The choice is the Miners'. They cannot legitimately argue that their survival is dependent on adherence to their picketing and striking tradition. For the shedding of that tradition merely means acceptance of the grievance procedure as the proper dispute-settling forum—which, in turn, amounts to no more than the honoring of the Agreement. There cannot be both pride in the tradition and respect for the Agreement. *Id.* at 22.

Some observers believe that the ARB's decision in ARB No. 108 was the principal reason for the decline in unauthorized grievance strikes. Interview with Steve Lindner, *supra*, n.1. Also, see Appendix VI, showing a precipitous drop in wildcat strike activity starting in 1978, the year after ARB No. 108.

66. *See* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 409-10 (1981).

67. *See* Article XXVII.

68. *Id.*

69. *Id.*

70. *See* P. Clark, *supra* note 10 at 63-64. Consolidation Coal Co., Central Shop and United Mine Workers, District 29, Local 6114, 77-1 ARB 8300 (1977) (Dyke, Arb.).

strike,[71] which comes into play in arbitral reasoning. For example, in *Jim Walter Resources, Inc. and United Mine Workers of America, District 20, Local 1928*,[72] the company discharged a number of employees for leading an illegal work stoppage to protest the discharge of a fellow employee for insubordination. The union denied that the grievants were picketing, since they carried no signs and attempted to dissuade no one from entering the plant.[73] The arbitrator denied the grievance finding that the grievants had engaged in picketing.[74] In explaining his affirmation of the severity of the discipline the arbitrator said the following:

> This arbitrator is aware that discharge is the most severe discipline that a company may administer. However, I am mindful that the incident which precipitated the walkout (the firing of [C.]) was a grievable matter. The grievance procedure adopted by the parties was designed to handle precisely this type of incident. For employees to resort to self help over such an issue undercuts the grievance procedure and runs counter to the entire collective bargaining process between the company and the union.
>
> Persons engaged in unauthorized walkouts hurt not only the company but fellow employees. Employees are deprived of the opportunity to earn a living. The union itself suffers since its pension and benefit trusts are funded by employer contributions based on tons of coal produced and employee hours worked. Article XX(D). Wildcat strikes and unauthorized work stoppages have cut deeply into trust assets. During the instant strike, newspapers carried the announcement of possible reductions in benefits from the UMWA Health and Retirement Fund because of lower contributions due to lowered production and work time lost from strikes. The economic impact of this walkout which spread throughout the

---

71. *See supra* notes 7-11 and accompanying text; Appendix I.

72. 77-2 ARB. ¶ 8430 (1977) (Grooms, Arb.).

73. *Id.* at 4840.

74. In finding that the grievants had engaged in picketing the arbitrator defined picketing in the following terms:

> Picketing may include the posting of one or more members of a union at the entrance or approaches to a place of work against which a strike is being conducted for the purpose of watching or annoying the owner or workmen on the inside or for the purpose of interfering with the business or intimidating the patrons.

The arbitrator also cited Arbitrator Henry B. Welch's observations in *Lanson Industries, Inc.* and *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 612*:

> All the cases hold that to constitute picketing you don't have to walk up and down, you don't have to patrol a beat, you don't have to carry a sign, you don't have to utter a word or make any sound. All you have to do is just be there with fellow strikers in the immediate vicinity of the plant entrance or the approaches to the plant entrance where you can watch and observe anyone entering or leaving the plant.

Id.

> state and eventually idled most, if not all, underground and surface operations in Alabama, is well known. The monetary loss to employer, employee, the union, and citizens of this area is astronomical.[75]

Arbitrators are, perhaps, less likely to be influenced by the history of grievance strikes in the industry as we move away from the decade of the 70's.[76] Arbitrator Marvin J. Feldman in *Freeman United Coal Mining Co. and United Mine Workers of America, District 12, Local Union 1969*,[77] was not persuaded by the company's argument that the historical background of unauthorized work stoppages in the mine industry should be a factor in the arbitrator's decision. In that case the grievant had been discharged for picketing to protest the holding of rescue team practice sessions on the premises of a non-signatory to the contract.[78] Only one team member showed up for the practice. In this case, decided eight years after *Jim Walter Resources*,[79] the arbitrator distinguished the picketing at issue from that plaguing the coal industry in the 1970's in the following terms:

> From all of this it can hardly be stated that the grievant participated in picketing in the classical sense. Simply put, the picketing of the coal industry in the 70's was militant, caused loss of production, and was quite unlike the activity of the grievant in all manner and respect. Therefore, it can hardly be indicated that the grievant was guilty of any classical picketing as it is known in the coal industry.[80]

Arbitrator Feldman regarded the grievant's picketing as only serious enough to warrant a fifteen day suspension rather than discharge and sustained the grievance with this modified penalty.[81]

In some discipline and discharge cases involving work stoppages, the peculiar history of the coal industry undermines rather than strengthens the company's case. For example, in *Arch of Illinois, Inc., Horse Creek Mine and United Mine Workers of America, Local 13, District 12*,[82] the arbitrator cited the history of violence in

---

75. *Id.* at 4831-32.

76. The incidence of wildcat strikes receded precipitously beginning in 1978, *see* Appendix VI, and continues at a low level, because of the effects of ARB 108. Lindner *supra*, note 1.

77. 85-2 ARB ¶ 8518 (1985) (Feldman, Arb.).

78. *Id.* at 5125-26.

79. 77-2 ARB ¶ 8430 (1977) (Grooms, Arb.).

80. *Id.* at 5127.

81. *Id.* at 5128.

82. 93 Lab. Arb. (BNA) 1097 (1990) (Cohen, Arb.).

the coal industry in finding that the grievant did not engage in a sympathy strike but stayed home because of threats to himself, his family, and his property.[83]

The discipline and discharge cases involving work stoppages dramatically demonstrate how the uniqueness of the mining industry might influence the application of well-settled arbitral principles. Not only are other industry contracts likely to have no strike clauses, but arbitrators are likely to have little trouble sustaining discharges of employees who violate the no strike promise.[84]

4. Drugs and Alcohol

Mirroring the larger society, alcohol and drug issues become an increasing problem in the reported cases starting around 1984. Before that date during the study period no discipline and discharge cases involving alcohol and drug abuse were published. From 1984 to the end of the study period seven, just under 10%, of the discipline and discharge cases involved drugs and alcohol. And as discussed below an additional four cases reported during the study period dealt with the employer's authority to implement drug testing programs. Five of the seven alcohol and drug cases related to intoxication on the job, while the other two dealt with whether discipline was proper under the company's testing program.[85]

---

83. *Id.* at 1097. The grievant's refusal to work was in the context of a strike by the company's miners in sympathy with miners who engaged in a strike against the Pittston Coal Company.

84. *See, e.g.*, BERC Building Maintenance Co., Inc., 76 Lab. Arb. (BNA) 487 (1981).

85. Freeman United Coal Co., Fidelity No. 11 Mine and United Mine Workers of America, District 12, Local 5134, 82 Lab. Arb. (BNA) 861 (1984) (Roberts, Arb.); Boone Energy and United Mine Workers of America, District 17, Local 1696, 85 Lab. Arb. (BNA) 233 (1985) (O'Connell, Arb.); Consolidation Coal Co., Mid-Continent Region, Burning Star No. 4 Mine and United Mine Workers of America, District 12, Local 1825, 87 Lab. Arb. (BNA) 729 (1986) (Hoh, Arb.); Consolidation Coal Co., Western Region, Emery Mine and United Mine Workers, District 22, Local 1261, 82-2 ARB ¶ 8605 (1982) (Sass, Arb.); and Donaldson Mining Co. and United Mine Workers of America, District 17, Local 340, 89-1 ARB ¶ 8089 (1988) (Zobrak, Arb.). Two other mining cases reported during the study but not decided under the National Wage Agreement are the Pittsburgh & Midway Coal Mining Co. and United Mine Workers of America, Local Union No. 1332, 88-2 ARB ¶ 8480 (1988) (Cohen, Arb.) and Pittsburgh & Midway Coal Mining Co. and United Mine Workers of America, Local 1332, 91 Lab. Arb. (BNA) 431 (1988) (Cohen, Arb.). Of these seven cases including the two Pittsburgh & Midway Coal Mining Co. cases, companies won 81% of the time. The reasons for this winning percentage for companies are probably articulated best by Arbitrator Cohen in the Pittsburgh & Midway Coal Mining Co., 91 Lab. Arb. (BNA) 431, 434, where in denying the grievance

Given the heavy machinery and equipment that is used in the coal work place, intoxicated employees pose too great a hazard to be tolerated. Thus, the safety implications of intoxication in the mining industry have led to an unusually high rate of denied grievances in discipline and discharge cases involving intoxication.[86] And the reasoning of arbitrators in these cases reveals a pattern of concern about the effects of intoxication upon miner safety. For example, in denying the grievance in *Freeman United Coal Co. and United Mine Workers of America, District 12, Local 5134*,[87] Arbitrator Raymond R. Roberts said the following:

> One thing distinguishes this case and places it upon an entirely different footing from any of the other cases shown in the evidence. Grievant was in an extreme state of intoxication so that he was dangerous to himself and others. Whether or not that condition was a product of disease, Grievant should have recognized his condition and the danger it presented. Grievant nevertheless went ahead to operate dangerous equipment producing an immediate danger and jeopardy not only to his own life but also that of his fellow employees. Mine roads, especially in and about well traveled areas where haul truck [sic], powder trucks, Employees coming to work and other traffic is present, is dangerous enough. In a state of extreme intoxication under which Grievant sought to operate under those conditions, accident and injury is [sic] almost inevitable.[88]

Similarly, Arbitrator John F. Sass in *Consolidation Coal Co., Western Region, Emery Mine and United Mine Workers of America, District 22, Local No. 1261*,[89] denied the grievance partially based on he following stated concern:

> There can be no doubt that the coal industry, and this company in particular, considers the intoxication of employees during work hours to be a very serious offense indeed. The company here has submitted numerous prior arbitration awards in the coal industry which in turn refer to a host of other prior awards dealing with alcohol problems. In every single case, the Arbitrator upheld management's

---

he said the following:

> Some observations of the coal mining industry must first be made. Foremost among this is that statistics show that coal mining is the most dangerous occupation in which American workers can engage. Therefore, the requirement that the company maintain a safe and healthful work place must be taken literally and not merely as some pious statement.

86. *See id. Cf.* cases cited in ELKOURI & ELKOURI, HOW ARBITRATION WORKS 709 (4th ed. 1985).

87. 82 Lab. Arb. (BNA) 861, 865 (1984) (Roberts, Arb.).

88. *Id.*

89. 82-2 ARB ¶ 8605 (1982) (Sass, Arb.).

> decision to discharge an employee who was found to be under the influence of alcohol. The reason for this, aside from the obvious adverse effect on employee work and efficiency, is the potentially hazardous results that could be caused by the actions of any one intoxicated employee in a coal mine setting. *Thus, what might be considered in other industries to be a rather hard-nosed approach to problems of employee intoxication appears to be reasonably justified here. . . .* (emphasis added)[90]

On the other hand, concerns about safety in the mining work place cannot substitute for proof of intoxication. For example, in *Boone Energy and United Mine Workers of America, District 17, Local 1696*,[91] Arbitrator Edward J. O'Connell sustained the grievances of four employees who tested positive for four proscribed substances. Noting the failure of the blood and urine tests to demonstrate whether the grievants were intoxicated, the arbitrator said the following:

> It is the uncertainty, which the expert witness for the company candidly acknowledged, which renders the test results, by themselves, as an unreliable indicator of whether or not an individual is under the influence of any intoxicant, other than alcohol, when the sample is drawn. This lack of refinement in the science of testing is tragic in a sense because it can require the return to work of an individual who has in the past and may well in the future report to work under the influence, thereby endangering not only his life but the lives of others. In a contractual setting which calls for the application of the just cause standard to discharge matters no other [result] is possible, however, since to uphold the discharge would involve guesswork and speculation as to the condition of an employee, and not proof.[92]

And in *Donaldson Mining Co. and United Mine Workers of America, District 17, Local 340*,[93] the arbitrator refused to uphold discipline based upon a positive drug test, where the employer had not given employees and the union notice of the company's newly implemented drug policy. The arbitrator held that the purpose of drug testing is to warn rather than to trap employees.[94] In sustaining the grievance, the arbitrator affirmed the basic principle of industrial due process.[95]

---

90. *Id.* at 5703.
91. 85 Lab. Arb. (BNA) 233, 237 (1985) (O'Connell, Arb.).
92. *Id.*
93. 89-1 ARB ¶ 8089 (1988) (Zorak, Arb.).
94. *Id.* at 3456.
95. *See generally* Abrams & Nolan, *A Theory of Just Cause*, 1985 DUKE L.J. 594.

5. Unsatisfactory Performance

The remaining discipline and discharge cases may be thought of as falling into the category of unsatisfactory performance. Negligence,[96] inadequate performance,[97] and unsafe performance[98] cases are all species of unsatisfactory performance. The salient feature of arbitral analysis running through the majority of these cases is the

---

96. Freeman United Coal Mining Co. and United Mine Workers of America, District 12, Local 2488, 83 Lab. Arb. (BNA) 776 (1984) (Creo, Arb.) (where the Arbitrator sustained an employee's grievance growing out of a disciplinary suspension for negligent performance of his duties — the arbitrator citing disparate treatment by the employer); Alabama Bi-Products, Mary Lee No. 1 Mine and United Mine Workers of America, Local 7813, District 20, 85 Lab. Arb. (BNA) 793 (1985) (Gibson, Arb.); Consolidation Coal Co. and United Mine Workers of America, Local 1784, 84-2 ARB ¶ 8452 (1984) (Abrams, Arb.) (where the arbitrator sustained the grievance as to discharge but imposed a 10 day suspension on the grievants for negligently permitting a methane gas buildup in the mine in violation of safety regulations); Eastern Coal Corp. and United Mine Workers of America, District 30, Local 5737, 89 Lab. Arb. (BNA) 759 (1987) (Hewitt, Arb.) (where the arbitrator upheld the disciplining of the grievant for accident proneness, since a number of the incidents reflected the grievant's negligence).

97. Kanawha Coal Co. and United Mine Workers of America, Local 3453, 88 Lab. Arb. (BNA) 912 (1986) (Murphy, Arb.) (where the arbitrator sustained the grievance because of the company's failure to prove that the grievants had failed to perform the task at issue); Southern Ohio Coal Co. and United Mine Workers of America, District 6, Local 1886, 76-2 ARB ¶ 8608 (1976) (Ipavec, Arb.) (where the arbitrator with extreme reluctance sustained the grievance growing out of the company's mass discipline of nine grievants for leaving the foreman behind on the man trip from the mine; the company had failed to identify the perpetrators); Consolidation Coal Co. and United Mine Workers of America, District 12, Local 9721, 84-1 ARB. ¶ 8295 (1984) (Feldman, Arb.) (where the off duty union president's conversation of less than sixty seconds with an on duty employee was de minimis, not initiated by the grievant and not planned and the arbitrator rescinded the company's letter of reprimand to the union president); A&C Transport Co. and United Mine Workers of America, District 29, Local Union 8783, 85-2 ARB 8542 (1985) (Zobrak. Arb.) (where the arbitrator reduced the discharge to a 3-day suspension, because of the company's inconsistency in monitoring and enforcing company policy of drivers checking oil and water levels before operating their trucks).

98. *See, e.g.*, Harrison & Westin Corp. and United Mine Workers of America, District 30, 66 Lab. Arb. (BNA) 1067 (1976) (Cantor, Arb.) (where the arbitrator sustained the termination of the grievant for inability to perform his job); Consolidation Coal Co., Eastern Division, Ireland Mine and United Mine Workers, District No. 6, Local 1110, 78 Lab. Arb. (BNA) 473 (1982) (Ruben, Arb.) (where the arbitrator held that the company had not proved the grievant guilty of unsafe performance and the company could not discipline the grievant, a member of the mine health and safety committee, for insubordination in connection with the performance of his official duties); United Mine Workers of America, Local Union No. 6023 and Allied Chemical Corp., Semet- Solvay Division, 78-1 ARB ¶ 8006 (1977) (Dyke, Arb.) (where the arbitrator reversed the discharges of two employees despite their violation of a company rule newly promulgated in response to a mining accident fatality that resulted from conduct similar to grievant's). Consolidation Coal Co., Midwest Region, Rose Valley No. 6 Mine and United Mine Workers of America, District 6, Local Union 1557, 78-2 ARB ¶ 8558 (1978) (Ipavec, Arb.) (where the arbitrator overturned a disciplinary suspension of the grievant for failure to wear his safety glasses, because the discipline did not conform to the company's posted progressive discipline procedure).

arbitrator's concern about safety. For example, Arbitrator Charles F. Ipavec in *Southern Ohio Coal Co. and United Mine Workers of America, District 6, Local 1886*,[99] while upholding the grievance because of the company's insufficiency of proof said the following:

> Matters of safety, to prevent injuries and loss of life, must always be given a paramount position. The members of the bargaining unit rightfully may expect that the members of supervision will always be concerned about the safety of all of the people in the mine. Conversely, the members of supervision can expect that all of the members of the bargaining unit will be concerned about the safety of all of the people in the mine.[100]

In *Eastern Coal Corp. and United Mine Workers of America, District 30, Local 5737*,[101] Arbitrator Thomas L. Hewitt upheld the discipline of an "accident prone" grievant noting the following:

> Accident prone persons do not necessarily perform acts which cause accidents to occur to them. Often the accidents are the result of the lack of awareness of their surroundings and the lack of attention to the job they are performing . . . . The accident repeater course and the notice to the grievant emphasize the importance of the employee looking out for his own safety and paying closer attention to his environment while performing his job duties.[102]

And in *Consolidation Coal Co. and United Mine Workers of America, Local 1784*,[103] Arbitrator Roger I. Abrams reversed the discharge of the grievant but imposed a ten day suspension, based on his finding that the grievant should have known and corrected the condition that led to a buildup of methane gas in the mine.[104] Arbitrator Abrams' award was based in part on his belief that it would cause classified employees to be vigilant to safety concerns. In his analysis he noted:

> The union argues that the Grievants' attention was on the bad top and that is a real possibility. However, there are many hazards to watch out for, not the least of which is a methane build-up as a result of poor ventilation. A methane build-up in a coal mine presents a danger of extraordinary proportions. Worrying

99. 76-2 ARB ¶ 8608 (1976) (Ipavec, Arb.).
100. *Id.* at 7041-42.
101. 89 Lab. Arb. (BNA) 759 (1987) (Hewitt, Arb.).
102. *Id.* at 762.
103. 84-2 ARB ¶ 8452 (1984) (Abrams, Arb.).
104. *Id.* at 4986-87.

about a bad top cannot excuse failure to assure proper ventilation in the work area.[105]

The published cases demonstrate that safety concerns in the mining industry are of paramount importance in the resolution of discipline and discharge cases.

6. Other Cases

Discipline and discharge cases involving such offenses as insubordination and fighting in the coal industry are virtually indistinguishable from such cases outside the industry. For example, in *Consolidation Coal Co., Shoemaker Mine and United Mine Workers of America, District 6, Local 1473*,[106] the arbitrator applied a conventional analysis to find that the grievant had been insubordinate and deserved discharge.[107] In doing so, the arbitrator noted the special character of insubordination as an offense not subject to the progressive discipline norm.[108] And in accordance with well-settled arbitral principles the arbitrator found that the instructions were clear, understood to be an order, and accompanied by the supervisor's statement of the penalty for failure to comply.[109] Even though membership on the MHSC provides an employee with some immunity as seen in *Consolidation Coal Co. and United Mine Workers of America, District No. 6, Local 1110*, the severity of insubordination as a cause for discipline may well lead to the narrow construction of this immunity.[110]

---

105. *Id.* at 4987.

106. 77 Lab. Arb. (BNA) 927 (1981) (Nelson, Arb.).

107. *Id.* at 932-34.

108. *Id.* at 933.

109. *Id.* at 932-33. *See also* Southwestern Illinois Coal Corp. and United Mine Workers of America, District 12, Local 1392, 80 Lab. Arb. (BNA) 806 (1392) (Hewitt, Arb.) (where the arbitrator found the grievant's off duty fight with the company's labor relations representative to be work related and upheld the discharge). *Cf.* AMEX Coal Co., Ayrshire Mine and United Mine Workers of America, District 11, Local 1907, 83 Lab. Arb. (BNA) 1029 (1984) (Kilroy, Arb.) (where the arbitrator sustained the grievance as to insubordination, because the company failed to prove an intentional disregard of the management directive manifested either verbally or non-verbally); Consolidation Coal Co., Morgantown Operations, Pursglove No. 15 Mine and United Mine Workers of America, District 31, Local 2122, 87 Lab. Arb. (BNA) 111 (1986) (DiLauro, Arb.) (where the company failed to prove the supervisory authority of the directing employee).

110. 78 Lab. Arb. (BNA) 473 (1982) (Ruben, Arb.). *See, e.g.*, Jim Walter Resources, Inc. and United Mine Workers of America, District 20, Local 2245, 81 Lab. Arb. (BNA) 1115 (1983) (Williams, Arb.) (where the arbitrator found the grievant guilty of insubordination even though the incident leading to discipline occurred while the grievant was serving in his official capacity as safety committee chairman).

Perhaps unlike the trend in other industries, there is only one reported case of sexual harassment during the study period,[111] This dearth of cases is somewhat surprising in view of some evidence suggesting that sexual harassment has been a problem for women miners.[112] In *Consolidation Coal Co., Morgantown Operations, Pursglove No. 15 and United Mine Workers of America, District 31, Local 2122*,[113] the arbitrator essentially reduced the grievant's offense from a charge of sexual harassment to that of extreme invasion of privacy and blatant disregard for his fellow employees. The evidence did not show that the grievant had entered the female bathhouse, shower and dressing area and looked around as alleged by the company.[114] Rather, it showed that the grievant had opened the door and looked into the shower and dressing area for a few seconds before leaving.[115] Based on the state of the record, the arbitrator reduced the grievant's penalty from discharge to suspension without pay or benefits for sixty days.[116]

B. Compensation

Coal miners are among the highest paid workers,[117] and compensation cases constitute a substantial chunk of the arbitrators' caseload. As indicated in the Frequency Table, Appendix I, 58 of the 368 cases published during the study period involved compensation issues.[118] Almost 45% of the published compensation cases decided during the study period involved issues of holiday pay, reporting pay and bereavement pay.[119]

1. Holiday Pay

Virtually all of the holiday pay grievances involved the birthday holiday.[120] The employee birthday holiday is one of eleven holidays

111. Before 1973 virtually no women worked as miners. In 1977 there were 992 women miners, and in 1978 approximately 2800 (approximately 1% of the miners). PCOC, THE AMERICAN COAL MINER, A REPORT ON COMMUNITY AND LIVING CONDITIONS IN THE COALFIELDS 191 (1980).

112. *Id.* at 193.

113. 79 Lab. Arb. (BNA) 940 (1982) (Stoltenberg, Arb.).

114. *Id.* at 942.

115. *Id.*

116. *Id.* at 943.

117. PCOC, COAL DATA BOOK, 132-33 (1980).

118. *See* Appendix I.

119. *Id.*

120. In fact, Consolidation Coal Co. v. United Mine Workers of America, District 12, Local

observed under Article XII and is celebrated in honor of John L. Lewis, the late President and most powerful leader in the history of the UMWA.[121] Most of the litigation about birthday holidays concerned the designated birthday. Article XII, Section (g) permits an employee to designate a birthday holiday when a calendar birthday falls on a day when the employee is not scheduled to work. Article XII, Section (q) establishes the birthday holiday in the following terms:

> If the Employee's birthday occurs on a day when the mine or other facility at which he is employed works, the Employee has the option of taking his birthday off and receiving one shift of pay at his regular rate, including his regularly scheduled overtime, or he has the option of working on his birthday and receiving triple time for all time worked.
>
> If an Employee's birthday falls on any day on which he is not scheduled to work, including but not limited to February 29 or on any other scheduled holiday or during the vacation period or on a Saturday or Sunday, he may designate another day to celebrate his birthday holiday by electing one of the following:
>
> (1) designating another day to be off (and taking off such day) within the first ten (10) days of actual work by the Employee following the birthday holiday for which he shall be entitled to his regular rate, including regularly scheduled overtime, or
>
> (2) designating another day to work (and working such day) within the first ten (10) days of actual work by the Employee following the birthday holiday for which he shall be entitled to triple time, which is three times his straight time rate, for all time worked on that day.

Considerable controversy has surrounded the question of whether an employee must work the days before and after his birthday in order to preserve the right to designate a birthday under Section (g). While Article XII Section (e) provides that an employee must work on these qualifying days in order to receive holiday pay for birthdays not worked, it uses the following ambiguous language:

> Employees who do not work on . . . holidays will be paid their regular earnings for such day, including regularly scheduled overtime rates provided such Employee was not absent his last scheduled day prior to or his first scheduled day following the holiday because of an unauthorized work stoppage.

9721, 83 Lab. Arb. (BNA) 367 (1984) (Feldman, Arb.) is the only reported holiday pay decision during the study period that did not raise a birthday holiday issue.

121. *See* Article XII, Section (a). *See also* PCOC, THE AMERICAN COAL MINER, A REPORT ON COMMUNITY AND LIVING CONDITIONS IN THE COALFIELDS 4 (1980); P. Clark, *supra* note 10 at 4-19.

Do the qualifying days, before and after the holiday, under this provision attach to the designated birthday holiday or the calendar birthday? This controversy is capsulized in two cases decided by Arbitrator Jack Clarke. In 1981 Arbitrator Clarke decided *Jim Walter Resources, Inc., Mine No. 3 v. United Mine Workers of America, District 20, Local Union No. 1928.*[122] The issue was whether the company violated the 1981 Agreement when it refused to allow the grievant to designate an alternative birthday and work that day for triple pay when his calendar birthday fell during a sympathy strike. Disagreeing with another arbitrator and refusing to give precedential effect to ARB No. 105, the arbitrator held that the company did violate the Agreement.[123] The arbitrator reasoned that changes in Article XII, Sections (d) and (g) evidenced:

> an intent on the part of the drafters of the 1981 Coal Agreement to change that aspect of ARB Decision No. 105 which required an employee not to be absent from work because of an unauthorized work stoppage on the day immediately before and immediately after his actual birthday.[124]

Five years later, in 1986, Arbitrator Clarke, again confronted with the issue, reversed his earlier decision. He said that the company did not violate the Agreement by depriving an employee of the opportunity to designate an alternative birthday holiday and to work on that designated birthday for triple pay, where the employee was absent on the day before the calendar birthday holiday because of an unauthorized work stoppage.[125] Upon further reflection the arbitrator had concluded that the parties in their Agreement had not amended ARB No. 105. He noted that the parties had not specifically associated the qualifying days provision with the designated birthday (rather than the calendar birthday) in Section (e) of Article XII as they had specified designated birthday holiday work for premium pay treatment in Section (d),[126] The arbitrator held that an employee must work on the days before and after the calendar birth-

122. 82-1 ARB ¶ 8100 (1980) (Clarke, Arb.).

123. *Id.* at 3486-88.

124. *Id.* at 3488.

125. Freeman United Mine Coal Mining Co. v. United Mine Workers of America, District 12, Local 9878, 87 Lab. Arb. (BNA) 665 (1986) (Clarke, Arb.).

126. *Id.* at 668-69.

day, rather than designated birthday, in order to preserve the right to designate an alternative birthday.[127]

Another issue that has divided arbitrators is whether a company can require advance notice of the alternative birthday designation. The majority view is that the company can require a reasonable advance notice before an employee's calendar birthday that he intends to designate a certain day as his birthday holiday.[128] This management right is viewed as part of an employer's right to efficiently direct the work force.[129] The minority view is that the contractual language spelling out the designation right is clear and unambiguous. Since the clear terms of the contract do not provide for such notice, a minority of arbitrators refuse to rewrite the contract in a way that would give companies the right to require advance notice.[130]

What of the employee who is prevented from working on his birthday by forces beyond his control? Should an employee who intends to work on his birthday and earn triple pay but is prevented from doing so have a right to designate an alternative birthday? Based on fairness concerns, arbitrators hold that in such unpreventable circumstances employees should not be deprived of the right to earn extra money on the birthday holiday.[131] In *Badger Coal Co. v. United Mine Workers of America*,[132] the arbitrator noted that the objective of Article XII is to "afford the employee the opportunity to work his birthday and to be paid triple time or not to work his birthday and receive straight time." The arbitrator thought that the

---

127. *Id.* at 667, 669.

128. *See* Consolidation Coal Co. v. United Mine Workers of America, District 12, Local Union 9721, 83-2 ARB ¶ 8533 (1983) (Feldman, Arb.) (where the arbitrator cites his award for the company as the majority rule and cites arbitral support for this view).

129. *Id.*

130. *See, e.g.*, Carbon Fuel Co., Mine 34 v. United Mine Workers of America, Local 2236, 76-1 ARB ¶ 8175 (Krimsly, Arb.) (where the arbitrator uses this rationale to sustain the grievance). *See also* Consolidation Coal Co., 83-2 ARB ¶ 8533 (1983) (Feldman, Arb.) (citing cases in support of the minority position).

131. *See, e.g.*, Badger Coal Co. v. United Mine Workers of America 86-1 ARB ¶ 8057 (1985) (Probst, Arb.) (where the arbitrator granted the designation right because a major snowstorm prevented the grievant from working on his birthday); Alabama By-Products Corp., Gorgas No. 7 Mine v. United Mine Workers of America, District 20, Local 7813, 68 Lab. Arb. (BNA) 992 (1977) (Grooms, Arb.) (where the arbitrator granted the grievant the designation right because his birthday occurred while he was serving jury duty).

132. 86-1 ARB ¶ 8057 (1985) (Probst, Arb.).

denial of this option, where an employee was prevented from working due to forces beyond his control, would be contrary to the "spirit that the negotiators brought to the Agreement."[133]

Whether an employee can redesignate his alternative birthday holiday or is bound by the initial designation,[134] whether an unauthorized work stoppage occurred on a qualifying day,[135] whether an employee who chose not to work on a scheduled Sunday work day is entitled to premium pay,[136] and whether an employee has a right to designate an overtime shift as his birthday,[137] are also issues that have been decided under the birthday holiday provision. On premium pay issues the parties' intent to create an opportunity for employees to earn premium pay is the thread that runs through arbitral decisions, causing close questions to be decided in favor of preserving this opportunity.[138]

2. Reporting Pay

Another of the compensatory allowances granted to unit employees is reporting pay under Article IX, Section (c) of the National Wage Agreement. That provision essentially entitles unit employees to four hours' pay for reporting to work unless the employer notifies the employee not to report.[139] Under this provision the Employer

---

133. *Id.* at 3235.

134. *See* North American Coal Corp., Powhatan No. 3 Mine v. United Mine Workers of America, Local 2262, District 6, 67 Lab. Arb. (BNA) 723 (1976) (Dworkin, Arb.) (where the arbitrator held that the contract entitled an employee to no more than one designation of an alternative birthday).

135. *See* Windsor Power House Coal Co., Beach Bottom Mine v. United Mine Workers of America, Local 6362, 68 Lab. Arb. (BNA) 835 (1977) (Perry, Arb.) (where the arbitrator found an unauthorized work stoppage on a qualifying day and denied the grievance).

136. *See* Consolidation Coal Co. v. United Mine Workers of America, District 12, Local 2216, 82 Lab. Arb. (BNA) 819 (1984) (Feldman, Arb.) (where the arbitrator held that Article XII, Section (g) gave an employee who chose to not work on a scheduled work day the right to his regular rate including premium pay if that is his regular rate for the day).

137. *See* Amherst Coal Co., 3-A Surface Mine v. United Mine Workers of America, District 17, Local 1302, 87-2 ARB 8588 (1987) (Stoltenberg, Arb.) (where the arbitrator held that the grievant was not entitled to designate an overtime shift as his birthday holiday, since he had no right to the overtime opportunity in that instance).

138. Note the different outcome in Amherst Coal Co., 3-A Surface Mine if the grievant had been entitled to the overtime opportunity in question. *Id.* at 6407.

139. The provision read as follows:

Section (c) Reporting Pay

does retain the discretion to assign other than regular work and to deny reporting pay if the employee refuses to perform assigned work. Thus, the reporting pay provision places the cost of employees' needlessly reporting to work on the employer rather than the inconvenienced employees.[140] Though the reporting pay provision is clear in not obligating the employer to pay any portion of the four hours "not worked by the Employee due to his refusal to perform assigned work," that provision is complicated by the safety rights of employees under Article III of the agreement.

Article III permits employees exercising their individual safety rights to refuse to perform under abnormally and immediately dangerous working conditions.[141] How should refusals to perform work

---

Unless notified not to report, when an Employee reports for work at his usual starting time he shall be entitled to four (4) hours' pay whether or not the operation works the full four hours, but after the first four (4) hours, the Employee shall be paid for every hour thereafter by the hour, for each hour's work or fractional part thereof. If, for any reason, the regular routine work cannot be furnished, the Employer may assign the Employee to other than the regular work. Reporting pay shall not be applicable to any portion of the four hours not worked by the Employee due to his refusal to perform assigned work. Notification of Employees not to report means reasonable efforts by management to communicate with the Employee.

140. Arbitrator Whyte described the purpose of reporting pay provisions as follows in S&S Corp. v. United Mine Workers of America, Local 1737, 64 Lab. Arb. (BNA) 609, 612 (1975) (Whyte, Arb.):

A reporting pay clause has a twofold purpose. It is designed, first, to compensate employees for the time and expense involved in coming to work only to find that there is no work for them. It is deemed to be the employer's duty to inform his employees of the fact that, on given occasions, there is no work unless he is prevented from doing so because of reasons beyond his control. The situation contemplated is one in which the employee is scheduled for work but is then unscheduled and inconvenienced because of Company's failure to properly manage the work to be performed and failure to give timely notice of the change in scheduling. The second purpose is to penalize Company (i.e., force pay for no work) because of a situation it mismanaged with resulting inconvenience and expense to employees.

141. Article III reads in part:

Section (i) Preservation of Individual Safety Rights

(1) No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an Employee in good faith believes that he is being required to work under such conditions he shall immediately notify his supervisor of such belief and the specific physical conditions he believes exist. The Employee shall state the factual basis for his belief but shall not be required to cite applicable law or regulation. Unless there is a dispute between the Employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary Employees, including the in-

perceived to be abnormally and immediately dangerous be treated under the reporting pay provision? Should such refusing employees receive reporting pay? Half of the reporting pay cases published during the study period addressed this issue.[142] The majority view among published arbitrators is that properly asserted safety objections to performing assigned work permit employees to both refuse performance and receive reporting pay.[143] However, there is a minority view that the existence of an abnormally dangerous working condition merely entitles employees to be excused from performing assigned work and does not entitle them to reporting pay.[144] Dangerous conditions outside of the employer's control that frustrate

---

volved Employee.

(2) If the existence of such condition is disputed, the Employee shall have the right to be relieved from duty on the assignment in dispute . . . .

(3) If the dispute remains unsettled following the investigation by a member of the Mine Health and Safety Committee and involves an issue concerning compliance with federal or state mine safety laws or mandatory health or safety regulations, the appropriate federal or state inspection agency shall be called in immediately and the dispute shall be settled on the basis of the findings of the inspector with both parties reserving all rights of statutory appeal. Should the federal or state inspector find that the condition complained of requires correction before the Employee may return to his job, the Employer shall take the corrective action immediately. Upon correction, the complaining Employee shall return to his job. If the federal or state inspector does not find a condition requiring correction, the complaining Employee shall return to his job immediately.

(4) For disputes not otherwise settled, a written grievance shall be filed no later than five working days after the findings of the inspector and the dispute shall be referred immediately to step 3 as provided for in Article XXIII, Settlement of Disputes, Section (c)(3).

142. *See* Buffalo Mining Co. v. United Mine Workers of America, District 17, Local 8454, 90 Lab. Arb. (BNA) 939 (1988) (Feldman, Arb.) (where the arbitrator held that the grievants did not qualify for reporting pay despite their safety objection to performing assigned work since the employees did not properly assert their safety rights under Article III.); Peabody Coal Co., No. 10 Mine v. United Mine Workers of America District 17, Local Union 2271, 87-1 ARB ¶ 8222 (1987) (Stoltenberg, Arb.) (where the arbitrator held that the grievants were entitled to reporting pay, since the employer was unable to meet their safety objection by providing other safe work); Buffalo Mining Co., Mine 9-A v. United Mine Workers of America, Local Union No. 8454, District No. 17, 79-2 ARB ¶ 8391 (1979) (Ipavec, Arb.) (where the arbitrator held that refusals to perform assigned work under the safety disputes procedure of Article III is sufficient justification for reporting pay); Consolidation Coal Co. v. United Mine Workers of America, District 6, Local 1808, 1975 ARB ¶ 8215 (1975) (Stokes, Arb.) (where the arbitrator held that Article IX, Section (c) relieved the employer of any obligation to pay reporting pay where employees refused to perform assigned work, even if the refusal was based upon a belief in abnormally dangerous working conditions).

143. *See* Buffalo Mining Co., 90 Lab. Arb. (BNA) 939 (1988) (Feldman, Arb.); Peabody Coal Co., 87-1 ARB ¶ 8222 (1987) (Stoltenberg, Arb.); Buffalo Mining Co. 79-2 ARB ¶ 8391 (1979) (Ipavec, Arb.).

144. *See* Consolidation Coal Co. 1975 ARB ¶ 8215 (1975) (Stokes, Arb.).

an employee's efforts to report to work have not qualified employees for reporting pay.[145] On the other hand, employer refusals to permit employees to work where no notice has been given are found to be straightforward violations of Article IX, Section (c).[146]

There appears to be little dispute that the "reasonable efforts" to notify employees not to report, called for in Section (c), do not require contacting employees individually either face-to-face or by telephone.[147] While these efforts certainly qualify as reasonable, employees may also be reached by telegram, television or radio announcements, mine postings or other means. Arbitrator Rimmel in *Clinchfield Coal Co., McClure No. 1 Mine v. United Mine Workers of America, District 28, Local Union 2274*,[148] held that the employer's efforts were unreasonable under the circumstances. In that case the employer attempted to place announcements of the following message on thirteen radio and two television stations:

> By the authority of [K.], Vice President, Operations, Clinchfield Coal Co.—McClure #1 Mine will be idle on the owl shift due to a fan failure.[149]

The evidence suggested that only three of the stations contacted by the employer actually broadcasted the announcements.[150] Furthermore, the employees were not told which stations to listen to for announcements, and there was evidence that some employees lived so far from the mine that they needed to leave their houses

145. *See* Union Carbide Corp. and United Mine Workers of America, Local 6243, District 17, 79 Lab. Arb. (BNA) 593, 596 (1982) (Lieberman, Arb.) (where the arbitrator refused to grant reporting pay to an employee who was prevented by hazardous driving conditions from reporting to work noting, "[T]here is no record of any employee ever having been paid for attempting to come to work and then being unable to do so because of road conditions.").

146. *See* Eastern Associated Coal Corp. v. United Mine Workers of America, Local 71, 86-1 ARB ¶ 8133 (1986) (Murphy, Arb.) (where the employer prevented employees who had been attending an employer sponsored compensation meeting from taking transportation into the mine after the meeting ended; the arbitrator found this deprivation of work not to be backed by the appropriate notice under IX(c)); Alabama By-Products Corp., Gorgas No. 7 Mine v. United Mine Workers of America, District 20, Local No. 7813, 79-1 ARB ¶ 8082 (1978) (Clarke, Arb.) (where the arbitrator reversed the employer's decision not to pay the grievant reporting pay where the grievant reported to work for light duty and was refused an assignment).

147. *See* Clinchfield Coal Co., McClure No. 1 Mine v. United Mine Workers of America, District 28, Local No. 2274, 86-2 ARB 8593 (1985).

148. *Id.*

149. *Id.* at 5489.

150. *Id.* at 5491.

before an announcement would have been made in the local media.[151] The arbitrator said that the employer was estopped to claim reasonable notice where employees might have listened to as many as twelve stations without hearing an announcement.[152] He noted that employees would lose their standing to complain about not receiving notice if they were given a list of stations to listen to and did not listen. The arbitrator also noted that reporting to work under Article IX, Section (c) means presenting oneself to a supervisor and not simply coming onto the premises and then leaving.[153]

3. Bereavement Pay

The two major issues arising under the bereavement pay provision of the agreement involve changes instituted in the 1974 Agreement. The 1971 provision allowed excused absences for up to three consecutive days including the day of the funeral and pay for any excused shifts the employee would have worked assuming he attended the funeral.[154] Besides expanding the category of "immediate family" the 1974 provision allowed excused absences for "up to three (3) days, two (2) to be consecutive and include the day of the funeral and the third at the Employee's option." It also mandated the receipt of pay if the employee attended the funeral.[155] The lan-

---

151. *Id.*
152. *Id.* at 5491.
153. *Id.* at 5491-92.
154. The 1971 contractual provision read as follows:
Article VII Allowances
Section (a) Bereavement Pay
When death occurs in an employee's immediate family (wife, mother, father, mother-in-law, father-in-law, son, daughter, brother or sister) an employee upon request will be excused for up to three consecutive days which includes the day of the funeral. The employee shall receive pay at his regular rate for any such excused shifts he would have worked provided it is established that he attended the funeral.
155. 1974 contractual language is as follows:
Article IX Allowances
Section (a) Bereavement Pay
When death occurs in an Employee's immediate family (spouse, mother, father, mother-in-law, father-in-law, son, daughter, brother or sister, step-father, step-mother, grandfather, grandmother and grandchildren), an Employee upon request will be excused for up to three (3) days, two (2) to be consecutive and include the day of the funeral and the third at the Employee's option. The Employee shall receive pay at his regular or applicable overtime or premium rate, provided it is established that he attended the funeral.

guage of the 1974 provision has been replicated in the 1978, 1981, 1984, and 1988 Agreements. Disputes under the new language have involved the meaning of "consecutive days" and an employee's entitlement to bereavement pay when a bereavement related excused absence occurs during an unauthorized work stoppage.

The facts of *Consolidation Coal Co., Humphrey No. 7 Mine v. United Mine Workers of America, District No. 31, Local 1058*[156] raise the question of whether "consecutive days" under Article IX, Section (a) means scheduled work days or calendar days. As noted above, the provision entitles an employee to his regular or applicable premium pay for absences up to three days — two to be consecutive and include the day of the funeral and the third at the employee's option—if the employee attends the funeral. In *Consolidation Coal Co.* a grievant's father died on Friday, October 31, and the grievant selected this day as his option day.[157] On Thursday, October 30, the company had scheduled the grievant to work on Saturday, November 1.[158] The company excused the grievant on Saturday. The grievant was not scheduled to work on Sunday, and he attended his father's funeral on Monday, November 3. The company paid the grievant for Friday, his option day, and Monday, the day of the funeral but not Saturday, since it was not consecutive with Monday, the day of the funeral.[159] The union argued that Saturday was consecutive with Monday, since "consecutive days" in Article IX, Section (a) referred to scheduled work days and not calendar days as claimed by the company.[160] The arbitrator denied the grievance citing clear contractual language and ARB No. 197.[161] The arbitrator noted, however, that the union's interpretation of "consecutive days" as scheduled work days would make more sense, since unscheduled work days need not be excused under the provision and under the

156. 89 Lab. Arb. (BNA) 179 (1987) (Wren, Arb.).

157. *Id.* at 179.

158. *Id.*

159. *Id.*

160. *Id.* at 181-82.

161. *Id. See also* Jewell Ridge Coal Corp., Big Creek Tiller Mine v. United Mine Workers of America, District No. 28, Local Union 6167, 1975 ARB ¶ 8121 (1975) (Cantor, Arb.) (also adopting the majority view). *But cf.* Consolidation Coal Co., Humphrey No. 7 Mine *supra* note 119 at 180-182 (discussing the minority view contained in unpublished cases).

interpretation adopted by the employer the amount of bereavement pay depends on the happenstance of the funeral date.[162]

The 1974 provision also changes the 1971 provision by deleting any reference to lost pay as a condition for receiving bereavement pay.[163] In *Valley Camp Coal Co., No. 1 Mine v. United Mine Workers of America, District No. 6, Division No. 4, Local 1417*,[164] the grievant requested bereavement leave on a scheduled work day that could not have been worked because of an unauthorized work stoppage that occurred on that day. The grievant admittedly would not have worked during the work stoppage.[165] The Company argued that the grievant was not entitled to bereavement pay since such pay is intended to prevent lost wages that otherwise would have been earned and the grievant had no lost wages due to the work stoppage.[166] Arbitrator Ipavec found that the grievant was entitled to bereavement pay.[167] He cited two parts of Article IX, Section (a). First, he noted that an employee must be excused in order to receive bereavement pay. Second, he noted that unlike the 1971 provision the 1974 provision did not tie bereavement pay to lost work. Arbitrator Ipavec concluded that where the unauthorized work stoppage occurs after the excuse has been secured, the company must pay bereavement pay even though the employee would not have worked during the unauthorized work stoppage.[168]

4. Other Issues

Other compensation cases raise issues that are not unique to the coal industry. They involve straightforward, factual disputes that

---

162. Consolidated Coal Co., 89 Lab. Arb. (BNA) 179 (1987) (Wren, Arb.).

163. Compare the last sentence in the 1971 provision to that in the 1974 provision, *see supra* notes 154-55.

164. 67 Lab. Arb. (BNA) 1167 (1976) (Ipavec, Arb.). This case presents a typical set of facts that tests the import of the amendment.

165. *Id.* at 1169.

166. *Id.* at 1168.

167. *Id.* at 1171-72.

168. *Id.* at 1170-72. *Accord* U.S. Pipe & Foundry Co. v. United Mine Workers of America, District 20, Local 7918, 65 Lab. Arb. (BNA) 111 (1975) (Grooms, Arb.).

turn on the arbitrator's findings,[169] or conventional contract interpretation issues that are resolved by the application of well settled principles of construction.[170] Arbitrators place the burden of proof typically on the union as grievant in these contract interpretation cases.[171]

As with other multi-employer contracts, local agreements, permissible under Article XXVI, Section (b), often supplement arrangements reached under the Agreement.[172] Because of the special place given to past practices that are not inconsistent with the Agreement under Article XXVI(b), contract interpretation cases in the compensation area often involve discussions of past practices.[173]

Other compensation issues include military pay,[174] training

169. *See, e.g.*, Southern Ohio Coal Co. v. United Mine Workers of America, District 6, Local 1890, 83 Lab. Arb. (BNA) 523 (1984) (Feldman, Arb.) (involving a factual dispute about whether the grievant was asked to work overtime).

170. *See, e.g.*, Peabody Coal Co. No. 10 Mine v. United Mine Workers of America, District 12, Local 9819, 89-1 ARB ¶ 8111 (1988) (Hewitt, Arb.) (involving the entitlement of employees to a full day's pay where work was prevented by equipment malfunction — Articles IX, Sections (c) and (d), III, Section (o) and IV, Section (d)(4)); Fox-Ten Coal Co. v. United Mine Workers of America, Local 7950, 82-2 ARB ¶ 8544 (1982) (Nicholas, Arb.) (involving the appropriate wage rate for computing vacation pay under Articles XIII, Section (d) and XIV, Section (f)); Alabama By-Products Corp. v. United Mine Workers of America, District 20, Local 1881, 76-2 ARB ¶ 8568 (1976) (Grooms, Arb.) (involving the entitlement of trainees under Article XVI, Section (g) to pay for training time); Consolidation Coal Co., Georgetown No. 12 Mine v. United Mine Workers of America, District No. 6, Local Union No. 7690, 78-1 ARB ¶ 8259 (1978) (Ipavec, Arb.) (involving the basis of vacation pay under Articles XIII, Section (d) and XIV, Section (f)); Eastern Associated Coal Corp., Wharton No. 4 Mine, Barrett, West Virginia v. United Mine Workers of America, District No. 17, Local No. 781, 78-1 ARB ¶ 8107 (1978) (Wren, Arb.) (involving whether the grievant was entitled to his shift differential on a temporary assignment under Articles VI, Section (c) and IX, Section (e)).

171. *See* Donaldson Mining Co. v. United Mine Workers of America, District No. 17, Local Union No. 340, 86-2 ARB ¶ 8617 (1986) (Zobrak, Arb.); Southern Ohio Coal Co. v. United Mine Workers of America, District 6, Local 1890, 83 Lab. Arb. (BNA) 523 (1984) (Feldman, Arb.).

172. *See, e.g.*, Arch of West Virginia, Inc. v. United Mine Workers of America, District 17, Local Union 5958, 90 Lab. Arb. (BNA) 891 (1988) (Stoltenberg, Arb.) (where the arbitrator found the company in violation of a local agreement when it began paying employees on a bi-weekly rather than weekly basis).

173. *See* Peabody Coal Co. v. United Mine Workers of America, District 17, Local Union 1503, 92 Lab. Arb. (BNA) 1086 (1989) (Stoltenberg, Arb.) (where past practices were dispositive of the issues); Peabody Coal Co., No. 10 Mine v. United Mine Workers of America, District 12, Local 9819, 89-1 ARB ¶ 8111 (1988) (Hewitt, Arb.); Saginaw Mining Co. v. United Mine Workers of America, Local Union No. 9695, 83-1 ARB ¶ 8153 (1983) (Nicholas, Arb.) (where past practice helped the arbitrator to frame the issue).

174. *See* Carbon Fuel Co. v. United Mine Workers, District 17, Local 2236, 67 Lab. Arb. (BNA) 1038 (1976) (Cantor, Arb.) (where the arbitrator found the grievant entitled to military pay under Article IX, Section (d), even though an unauthorized work stoppage occurred at the mine during the time).

pay,[175] and injury pay.[176] While these cases are generally straightforward, injury pay cases sometimes raise definitional questions that affect an employee's entitlement to pay. Employees who are injured on the job are paid for the complete shift upon proof of medical treatment under Article III, Section (o)(5);[177] however, that provision will not support shift pay for injuries that are not caused by working conditions.[178] Under Article III, Section (o)(5) an employee is only paid until he reaches the portal when the employee becomes sick during the shift.[179] In *Island Creek Coal Co., V.P. No. 2 Mine v. United Mine Workers of America, Local 1568*,[180] the arbitrator held that the word "sick" "refers to some condition arising from circumstances unrelated to work in the mine — *e.g.*, nausea, a headache due to external causes."[181] Injuries, on the other hand, are caused by mining conditions.[182]

The validity of side agreements providing for special compensation to employees varies from company to company. Arbitrator

---

175. *See* Badger Coal Co. v. United Mine Workers of America, District No. 31, Local No. 1512, 69 Lab. Arb. (BNA) 756 (1977) (Wren, Arb.) (where the union could not prove in the absence of a local agreement or past practice that the company agreed to pay for training under Article XVI, Section (e)).

176. *See* Jim Walter Resources, Inc., Flattop/NEBO Mine v. United Mine Workers of America, District 20, Local Union No. 6255, 82-2 ARB ¶ 8518 (1982) (Clarke, Arb.) (where the union failed to show a binding practice requiring injury pay under Article XXVI, Section (b)).

177. *See* Peabody Coal Co., Pawnee No. 10 Mine v. United Mine Workers of America, District 12, Local 9819, 88 Lab. Arb. (BNA) 1027 (1987) (Hoh, Arb.).

178. *See* Island Creek Coal Co., V.P. No. 2 Mine v. United Mine Workers of America, Local 1568, 84-2 ARB ¶ 8316 (1984) (Mittelman, Arb.) (where the arbitrator found that the grievant's illnesses were not caused by conditions in the mine since they were avoidable).

179. Article III, Section (o)(5) reads as follows:

> (5) When an Employee is injured during his shift, he shall be promptly removed from the mine, and, upon submission of proof of medical treatment for that injury, he shall be paid for the complete shift. When an Employee becomes sick during his shift, and leaves because he cannot perform his work, he shall be paid until he reaches the portal.

Agreement of 1988.

180. 84-2 ARB ¶ 8316 (1984) (Mittelman, Arb.).

181. *Id.* at 4407.

182. *Id.* at 4407. Regarding the smoke inhalation that grievants claimed caused the illness in question the arbitrator said the following:

> In any event, with regard to smoke inhalation, it is well known that such inhalation can involve actual physical trauma, e.g., burning or irritation to the respiratory system. Such a sudden, unexpected physical trauma is sufficient, in my opinion, to constitute an "injury" for purposes of Article III, Section (o)(5), of the 1981 Agreement.

Id. As this case demonstrates, the factual issue may be decided against the grievant even though the legal issue is decided in her favor.

Wren reached different conclusions regarding the same side agreement in *Amherst Coal Co., MacGregor Cleaning Plant v. United Mine Workers of America, District No. 17, Local Union No. 5958.*[183] Between the first award sustaining the grievance and the second award denying the grievance, the company and union entered into a new collective bargaining agreement and the grievant was put on notice that the side agreement would be short-lived.[184] Thus, the elements of promissory estoppel that supported the arbitrator's first award were no longer present at the time of the second award.[185]

C. *Work Assignment*

In descending order of frequency, work assignment cases concern subcontracting, filling job vacancies, supervisory performance of unit work, jurisdictional disputes, and a variety of other issues that arise only occasionally. Approximately 16% of the reported cases during the study period involved work assignment issues.[186]

1. Jurisdictional Disputes

Article IA is the work preservation article of the Agreement. It assures that the work jurisdiction of unit employees will not be undermined by managerial work assignments that divert unit work from the employees who customarily perform it.[187] Potential sources of

183. 82-1 ARB ¶ 8258 (1982) (Wren, Arb.) (sustaining the grievance on the basis of the company's inducement of the grievant and its unjust enrichment); 84 Lab. Arb. (BNA) 1181 (1985) (Wren, Arb.) (denying the grievance where the grievant could no longer show the company's inducement).

184. 84 Lab. Arb. (BNA) 1181, 1181-82 (1985) (Wren, Arb.).

185. *Id.* at 1184.

186. Fifty-eight of 368 cases or 15.7% concerned the aforementioned work assignment issues.

187. Article IA Scope and Coverage

Section (a) Work Jurisdiction

> The production of coal, including the removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement. Contracting, subcontracting, leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

Nothing in this section will be construed to diminish the jurisdiction, express or implied, of the United Mine Workers

such diversion are exempt employees,[188] supervisory employees,[189] and independent contractors.[190] As discussed below an overwhelming majority of jurisdictional disputes involved the company's assignment of work to independent contractors.[191] However, some work assignment disputes involve different classifications of unit employees.[192] Unlike subcontracting and supervisory performance of unit work, the Agreement does not specifically address the resolution of intraunit jurisdictional disputes.

The Arbitration Review Board in ARB No. 78-11 explained that the "concept of work jurisdiction" has its genesis in the rights of seniority, which distribute job preferences among employee members

---

188. Article IA reads in part:
Section (b) Exemptions Clause

It is the intention of this Agreement to reserve to the Employers and except from this Agreement an adequate force of supervisory employees to effectively conduct the safe and efficient operation of the mines and at the same time, to provide against the abuse of such exemptions by excepting more such employees than are reasonably required for that purpose.

Coal inspectors and weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical forces of the Employer, working at or from a district or local mine office, are exempt from this Agreement.

All other Employees working in or about the mine shall be included in this agreement except essential supervisors in fact such as mine foremen, assistant mine foremen who, in the usual performance of their duties, may make examinations for gas as prescribed by law, and such other supervisors as are in charge of any class of labor inside or outside the mines and who perform no production work.

The union will not seek to organize or ask recognition for such excepted supervisory employees during the life of this contract.

The Employers shall not use this provision to exempt from the provisions of this Agreement as supervisors, more men than are necessary for the safe and efficient operation of the mine, taking into consideration the area covered by the workings, roof conditions, drainage conditions, explosion hazards, and the ability of supervisors, due to thickness of the seam, to make the essential number of visits to the working faces [sic] as required by law and safety regulations.

189. Article IA reads in part:
Section (c) Supervisors Shall Not Perform Classified Work

Supervisory employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: the burden is on the Employer to prove that classified work has not been performed by supervisory personnel.

190. *See infra* note 206.

191. *See infra* notes 203-236 and accompanying text.

192. *See, e.g.*, Balmoral Truck Garage v. United Mine Workers of America, District 17, Local 5815, 87 Lab. Arb. (BNA) 967 (1985) (Volz, Arb.).

of the seniority unit and state a preference to unit jobs.[193] Though the issue in ARB No. 78-11 concerned the employer's authority to establish a new seniority unit at a research and development facility, the ARB did note in passing the "conventional handling and deciding of work jurisdictional claims."[194] It affirmed the propriety of examining past practice and custom as the "usual method of deciding such claims."[195]

Arbitrators have used ARB No. 78-11 to resolve intraunit jurisdictional disputes. For example, in *Balmoral Truck Garage v. United Mine Workers of America, District 17, Local 5815*,[196] Arbitrator Marlin M. Volz was confronted with the question of whether employees of the construction crew or a mechanic from the Truck Garage should have performed the work of repairing a parking lot. The arbitrator noted that ARB No. 78-11 and Article XIX of the Agreement showed that Article IA is not only concerned with protecting unit employees from outsiders such as supervisors and independent contractors, but "can be construed as serving a larger purpose of protecting also established work jurisdictional claims of separate employment units of the Employer."[197] Noting the dearth of contractual guidance on resolving intraunit jurisdictional disputes the arbitrator said:

> It must be recognized that Section (a) of Article IA does not provide guidelines for resolving jurisdictional disputes between such employment units, nor does any other written provision within the National Wage Agreement expressly do so. As has been repeatedly held by panel arbitrators and the Arbitration Review Board, the question of work jurisdiction is to be determined by past practice and custom and by local agreement. Here no local agreement was shown to exist. This leaves as a basis for decision what the ARB in its Decision 78-11 described at page 11 as the "conventional handling and deciding of work jurisdiction claims between the units," which is to use the "usual method" to examine "past practice and custom."[198]

193. ARB No. 78-11, 7 (1979).

194. *Id.* at 11.

195. *Id.*

196. 87 Lab. Arb. (BNA) 967 (1985) (Volz, Arb.).

197. *Id.* at 969. Article XIX, Section (a) reads in part: "An Employee shall normally be assigned to duties customarily involved with his regular classified job . . . ."

198. *Id.* at 969.

The arbitrator then carried out a typical analysis of jurisdictional dispute cases first noting the union's burden of showing contractual provisions that grant jurisdiction over the disputed work exclusively to the grievant.[199] His analysis focused on whether the nature and place of the work reserved it exclusively to the grievant. Finding that the union failed to carry its burden of showing exclusive work jurisdiction, Arbitrator Volz denied the grievance.[200]

Other jurisdictional disputes involve the use of exempt rather than unit employees to perform the disputed work.[201] These cases turn on whether the disputed work is customarily performed by unit employees or related to the production of coal under Article IA, Section (a).[202]

2. Subcontracting

Though approximately 52% of the work assignment cases involved subcontracting,[203] the frequency of subcontracting disputes has escalated in recent years. Between 1975 and 1980, only one subcontracting case was reported.[204] Approximately 96% of the subcontracting cases were decided in the 1980's with increasing frequency after 1985.[205] The Agreements of 1981, 1984, and 1988 have all per-

199. *Id.* at 969-70.

200. Other cases involving intraunit jurisdictional disputes are: Bethenergy Mines, Inc. v. United Mine Workers of America, District 31, Local Union 2059, 86-2 ARB ¶ 8550 (1986) (Feldman, Arb.); Jim Walter Resources v. United Mine Workers of America, Local 2245, 82 Lab. Arb. (BNA) 689 (1984) (Nicholas, Arb.); Consolidation Coal Co., Franklin Mine No. 125 v. United Mine Workers of America, District 6, Local 1360, 82-1 ARB ¶ 8209 (1981) (Murphy, Arb.); Valleycamp Coal Co., Shop No. 8 v. United Mine Workers of America, District No. 17, Local 1054, 71 Lab. Arb. (BNA) 267 (1978) (Wren, Arb.).

201. *See, e.g.*, Muskingum Mining Co. v. United Mine Workers of America, Local Union No. 1818, 89-2 ARB ¶ 8356 (1988) (Nicholas, Arb.); Consolidation Coal Co., Blacksville No. 1 Mine v. United Mine Workers of America, District 31, Local 1588, 91 Lab. Arb. (BNA) 36 (1988) (Wren, Arb.).

202. *See* Consolidation Coal Co., 82-1 ARB ¶ 8209 (1981) (Murphy, Arb.) (where the arbitrator in denying the grievance characterized the research and development of a new technology as distinct from other cases (even related to research) where the work was customarily related to the production of coal.

203. Thirty of the 58 cases or 52% presented subcontracting issues.

204. Southern Ohio Coal Co., Meigs Mine No. 1 v. United Mine Workers of America, District No. 6, Local 1890, 70 Lab. Arb. (BNA) 891 (1978) (Ipavec, Arb.).

205. Approximately 70% of the reported subcontracting decisions were issued after 1985.

mitted subcontracting under Article IA with restrictions.[206] As noted by Arbitrator Roberts in *Peabody Coal Co., Camp No. 1 Mine v. United Mine Workers of America, District 23, Local 1793*,[207] Article IA of the Agreement distinguishes production work, repair and maintenance work, and construction work. Arbitrator Roberts summarizes the contractual subcontracting scheme as follows:

> 1. The production and processing of coal and the immediate support work associated therewith including certain enumerated aspects is work over which the Miners have exclusive jurisdiction. That work simply may not be contracted out under the contract and certainly may not be contracted out in the absence of fire emergency.
>
> 2. The Miners are given jurisdiction of only that repair and maintenance work which is customarily performed at the Mine or Central Shop. If the repair and

---

206. Article IA reads as follows in part:

Section (g) Contracting and Subcontracting

(1) Transportation of coal — The transportation of coal as defined in paragraph (a) may be contracted out under the Agreement only where contracting out such work is consistent with the prior practice and custom of the Employer at the mine; provided that such work shall not be contracted out at any time when any Employees at the mine who customarily perform such work are laid off.

(2) Repair and Maintenance Work — Repair and maintenance work of the type customarily performed by classified employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, in which case, upon written request on a job-by-job basis, the Employer will provide to the Chairman of the Mine Committee a copy of the applicable warranty or, if such copy is not reasonably available, written evidence from a manufacturer or a supplier that the work is being performed pursuant to warranty; or (b) where the Employer does not have available equipment or regular Employees (including laid-off Employees at the mine or central shop) with necessary skills available to perform the work at the mine or central shop.

(3) The Employer may not contract out the rough grading and mine reclamation work.

Section (i) Construction Work

All construction of mine or mine related facilities including the erection of mine tipples and sinking of mine shafts or slopes customarily performed by classified Employees of the Employer normally performing construction work in or about the mine in accordance with prior practice and custom, shall not be contracted out at any time unless all such Employees with necessary skills to perform the work are working no less than 5 days per week.

Provided further that where contracting out of such construction work customarily performed by classified Employees at the mine is permitted under this Agreement, such contracting shall be in accordance with prior practice and custom. Where contracting out is permitted under this section, prior practice and custom shall not be construed to limit the Employer's choice of contractors.

207. 82 Lab. Arb. (BNA) 1251 (1984) (Roberts, Arb.).

maintenance work falls within that category the Company is prohibited from contracting it out with certain exceptions enumerated above. Other repair and maintenance work may be contracted out free of prohibition.

3. Construction work which the Miners customarily perform may not be contracted out unless the Miners are working five days per week in which case it may be. All other construction work may be freely contracted out subject only to the restraints of prior practice and custom.[208]

This scheme suggests an analytical inquiry that Arbitrator Roberts concisely describes in the following way:

> Given the scheme of the contract, the initial issue in dealing with the merits of any dispute . . . is to determine the category in which the work falls under the contract. In most instances, the issue thus presented is to determine whether the work should be categorized as construction work or as repair and maintenance work. Once this issue is resolved, the next step in the analysis of the case is to apply the contractual rules applicable to the contracting out of that type of work.[209]

The facts of *Peabody Coal Co.*, presented yet another issue under the subcontracting provision. Since the work in that case was of a mixed character, containing elements of both new construction and maintenance and repair evoking different contractual rules, the arbitrator was called upon to define the difference between construction and maintenance and repair. He did so in the following terms:

> By basic definition, construction involves the creation of something new where nothing previously existed or the addition of something so totally new to an existing thing that it may be regarded as having an independent new existence. Repair and maintenance work on the other hand, involves working to an existing thing, ordinarily to renew it, but also in some cases to modify and improve it.
>
> Repair and maintenance work may involve the replacement of parts with new parts but it is nevertheless repair and maintenance work if there is a continuity of existence of the original thing. For example, if a mine pickup truck gets a new engine or four new tires, the original truck continues as an entity and may be regarded as having been repaired and maintained. On the other hand, if the truck is replaced, it is essentially a new independent existence even though it replaced an old truck and this would be true even if parts off the old truck were salvaged and incorporated into the new truck such as by keeping the tires or engine off the old truck. In such a case the new truck is essentially a new construction manufacture. The distinction can sometimes become one of degree and sometimes it is necessary to look at the immediate purpose of the work in order to draw the distinction.[210]

208. *Id.* at 1256.
209. *Id.* at 1256-7.
210. *Id.* at 1257.

Because of the closeness of the factual question in *Peabody Coal Co.* the arbitrator was forced to base his characterization of the work on his understanding of "the purpose or reason for its performance."[211] This inquiry into the purpose for the work brought the arbitrator to the conclusion that the work was new construction rather than maintenance and repair.[212]

Under Article IA, Section (g)(2), the union has the burden of proving that the work was customarily performed by unit employees.[213] If the union establishes customary performance, the company must prove that the subcontracting falls within one of the exceptions under Section (g)(2).[214] The union fails to meet its burden of proving customary performance where it can show no more than a mixed practice of unit and other employees (e.g., exempt employees) performing the disputed work.[215]

The foregoing discussion reveals that the subcontracting provisions of Article IA preserve work traditionally done by unit employees. This work preservation objective is clearly stated in Section (a).[216] While most of the subcontracting cases under Article IA have involved the questions of whether repair and maintenance were customarily performed by unit employees or whether the employer had available equipment or skilled employees to perform the work,[217] the

---

211. *Id.* at 1258.

212. *See* AMAX Coal Co., Chinook Mine v. United Mine Workers of America, District 11, Local 1216, 83 Lab. Arb. (BNA) 942 (1984) (Kilroy, Arb.) (where the arbitrator applied part of the aforementioned analytical scheme through a series of questions that led to a denial of the grievance).

213. 82 Lab. Arb. (BNA) 1251 (1984) (Roberts, Arb.).

214. *See, e.g.*, Drummond Coal Co. v. United Mine Workers of America, Local 1553, District 20, 82 Lab. Arb. (BNA) 473 (1984) (Nicholas, Arb.).

215. *See* Peabody Coal Co., 88 Lab. Arb. (BNA) 1027 (1987) (Hoh, Arb.).

216. *See supra* n. 187.

217. *See, e.g.*, McElroy Coal Co./ McElroy Mine v. United Mine Workers of America, District 6, Local 1638, 93 Lab. Arb. (BNA) 566 (1989) (McIntosh, Arb.); Cannelton Industries, Inc., Kanawha Division v. United Mine Workers of America, District 17, Local 8843, 90 Lab. Arb. (BNA) 705 (1988) (Stoltenberg, Arb.). In both cases the grievants were partially or fully successful based on the application of res judicata. Also raising the issues of performance and availability of equipment or skilled employees are: Freeman-United Coal Co. v. United Mine Workers of America, District 12, Local 1969, 90 Lab. Arb. (BNA) 649 (1987) (Feldman, Arb.); Southern Ohio Coal Co., Racoon Mine No. 3 v. United Mine Workers of America, Local 1957, 89 Lab. Arb. (BNA) 1262 (1987) (Lieberman, Arb.); Peabody Coal Co., Lynnville Mine v. United Mine Workers of America, District 11, Local 9926, 89 Lab. Arb. (BNA) 885 (1987) (Volz, Arb.); AMAX Coal Co., Ayrshire Mine v. United Mine

most intriguing cases have involved the question of whether unit employees are attempting to expand or merely preserve unit work. The pivotal work preservation language of Section (g)(2) is "work of the type."[218] Depending upon the broadness of interpretation, that language could encompass much work never done but capable of being done by unit employees. In a well-reasoned decision Arbitrator Robert W. Kilroy in *AMAX Coal Co., Ayrshire Mine v. United Mine Workers of America, District LL and its Local Union No. 1907*,[219] cited the following excerpt from ARB No. 78-48 as setting forth the proper test:

> The process of drawing lines on the basis of what work was and was not previously performed is sensitive and appropriately performed by the District Arbitrator on the basis of the parties' presentations at arbitration. It is not enough that previously performed work be merely similar to that in dispute. Surely the skills and techniques inherent in maintenance and repair work in general are often applicable to a variety of tasks, some more closely related than others. But the labor agreement is cast in terms of performance. The emphasis must not be on

---

Workers of America, District 11 and its Local Union No. 1907, 88 Lab. Arb. (BNA) 1281 (1987) (Kilroy, Arb.); Island Creek Coal Co., Virginia Pocahontas No. 5 Mine and Preparation Plant v. United Mine Workers of America, Local Union 2232, 87-1 ARB ¶ 8040 (1986) (Stoltenberg, Arb.); AMAX Coal Co., Ayrshire Mine v. United Mine Workers of America, Local Union 1907, 85-2 ARB ¶ 8325 (1985) (Witney, Arb.); Laurel Run Mining Co. v. United Mine Workers of American, District 31, Local Union 1829, 85-1 ARB ¶ 8247 (1985) (Feldman, Arb.); Island Creek Coal Co., Beatrice Mine v. United Mine Workers of America, Local 1374, 86 Lab. Arb. (BNA) 62 (1985) (Stoltenberg, Arb.); Consolidation Coal Co., Eastern Region Shoemaker Mine v. United Mine Workers of America, District 6, Local 1473, 84 Lab. Arb. (BNA) 1037 (1985) (Duda, Arb.); Consolidation Coal Co., Mine No. 12 v. United Mine Workers of America, District 6, Local 7690, 84 Lab. Arb. (BNA) 646 (1985) (Rybolt, Arb.); North American Coal Co. v. United Mine Workers of America, District 6, Local 1785, 84 Lab. Arb. (BNA) 388 (1985) (Feldman, Arb.); Island Creek Coal Co., Central Shop v. United Mine Workers of America, District 28, Local 1671, 84-2 ARB ¶ 8615 (1984) (Mittelman, Arb.); McWane Coal Co., Inc. v. United Mine Workers of America, Local No. 6969, 84-1 ARB ¶ 8151 (1984) (Nicholas, Arb.); AMAX Coal Co., Chinook Mine v. United Mine Workers of America, District 11, Local 1216, 83 Lab. Arb. BNA 942 (1984) (Kilroy, Arb.); Peabody Coal Co., Camp. No. 1 Mine v. United Mine Workers of America, District 23, Local 1793, 82 Lab. Arb. (BNA) 1251 (1984) (Roberts, Arb.); Shannopin Mining Co. v. United Mine Workers of America, District 4, Local 6159, 82 Lab. Arb. (BNA) 725 (1984) (Hewitt, Arb.); Peabody Coal Co., Linnville Mine v. United Mine Workers of America, District No. 11, Local 9926, 81 Lab. Arb. (BNA) 1229 (1983) (Duda, Arb.); Hobet Mining and Construction Co., Inc., Hobet 21 v. United Mine Workers of America, District 17, Local 2286, 80 Lab. Arb. (BNA) 158 (1982) (Hayes, Arb.); Reitz Coal Co. v. United Mine Workers of America, District 2, Local 6410, 82-2 ARB ¶ 8364 (1982) (Feldman, Arb.); Itmann Coal Co. v. United Mine Workers of America, District 29, Local Union No. 9690, 79-1 ARB ¶ 8296 (1979) (Feldman, Arb.).

218. See language of (g)(2) *supra* note 206.

219. 88 Lab. Arb. (BNA) 1281 (1987) (Kilroy, Arb.).

> whether a particular task is similar to that which has been previously performed, but on whether it has, in fact, been performed. This is not to say that meaningless distinctions should be endorsed; that the brand name has changed is irrelevant if the work remains the same. Moreover, at some point, work will be so closely identifiable as to be reasonably deemed the same task. Thus, if it may be determined that the work is the essential equivalent of that which has been previously, by custom, allocated to the Bargaining Unit, it may not be subcontracted except in those contractually-stipulated instances.[220]

In *AMAX Coal Co.*, the question was whether a swing box on mobile hydraulic cranes was improperly rebuilt by an outside contractor rather than unit employees. The union claimed that it had repaired similar units, making the rebuilding of the swing box "work of the type" to be performed by unit employees.[221] In the following terms the arbitrator denied the grievance finding that the work on the other units was similar but not substantially equivalent to the rebuilding of swing boxes:

> To allow "work of the type" to be defined by similarities would lead to an expansion of work jurisdiction and experiment in terms of human resources, time, and cost far beyond the ability of management to control. To allow "work of the type" to be bound by skills and functions such as "assembling/disassembling gears, bearings and seals" would immediately require any work of this nature to be done by classified employees without any consideration of resources and other demands upon time and personnel. Similarities, skills and functions tests would abridge the rights of management to manage personnel and assets. It would completely negate the longstanding "customary" language and binding precedence. If carried to its extreme, this interpretation would go beyond the net of job security to require the company to become a manufacturer of parts.[222]

In Arbitrator Kilroy's view substantial equivalence means "[a]ctual, ascertainable performance."[223]

Arbitrators will strictly enforce the company's obligation to use unit employees to produce coal under Article IA, Section (a).[224] And

---

220. *Id.* at 1284.

221. *Id.*

222. *Id.* at 1284-5.

223. *Id.* at 1284.

224. *See* Cannelton Industries, Inc., Kanawha Div. v. United Mine Workers of America, District 17, Local Union No. 8843, 79-1 ARB ¶ 8268 (1979) (Feldman, Arb.) (where the arbitrator rejected the company's argument that a non-unit crew from the equipment's manufacturing corporation could produce 60 to 80 tons of coal while testing the equipment without violating Article IA, Section (a)). *See also* McWane Coal Co., Inc. v. United Mine Workers of America, Local No. 6969, 84-1 ARB ¶ 8151 (1984) (Nicholas, Arb.) (where the company improperly contracted out the removal of coal waste from its sludge pot).

even construction that consists of the replacement of old parts with new ones will be deemed repair construction rather than new construction where it simply overhauls an existing system.[225] However, an arbitrator will uphold the company's decision to contract out the work if employees demonstrate an inability to perform the work even where work is of a type performed by unit employees. Work that cannot be performed cannot be claimed.[226]

Where violations are found, the remedy consists of returning unit employees to the *status quo ante*.[227] Where a local agreement exists that is valid under Article XXVI, Section (b), a remedy for its breach will involve an order that the company comply with the local agreement.[228] The remedy normally runs to members of the work force who would be performing the unit work and not to the entire unit.[229] The union has the burden of showing a basis for monetary relief.[230]

---

225. *See* Itmann Coal Co. v. United Mine Workers of America, District 29, Local Union No. 9690, 79-1 ARB ¶ 8296 (1979) (Feldman, Arb.) (where the arbitrator found that the replacement of two old sump pumps and the installation of a new third one was repair construction since the sump pump system existed before the repair and replacement of the pumps).

226. *See* Freeman-United Coal Co. v. United Mine Workers of America, District 12, Local 1969, 90 Lab. Arb. (BNA) 649 (1987) (Feldman, Arb.) (where the arbitrator held that the unit's inability to perform the work justified subcontracting whether the inability was due to lack of skills, lack of equipment, or the company's inability to appropriately direct the working force).

227. In *Cannelton Industries*, 79-1 ARB ¶ 8268 (1979) (Feldman, Arb.), the remedy for improper production of coal was the amount of time taken to produce the coal times wages at time and a half since the arbitrator found that an overtime shift would have performed the work. Similarly, in *Itmann Coal Co.*, 79-1 ARB ¶ 8296 (1979) (Feldman, Arb.), the arbitrator awarded wages in the amount of the time of performance of the work times the regular rate of pay. And in *McWane Coal Co.*, 84-1 ARB ¶ 8151 (1984) (Nicholas, Arb.), the arbitrator awarded the union a cease and desist order which gave unit employees an immediate opportunity to do the work.

228. *See* Island Creek Coal Co., Virginia Pocahontas No. 5 Mine and Preparation Plant v. United Mine Workers of America, Local Union 2232, 87-1 ARB ¶ 8040 (1986) (Stoltenberg, Arb.) (where the arbitrator ordered the company to make the union whole for the use of a subcontractor by awarding unit employees wages on an hour-for-hour basis with the contractor's employees pursuant to the local agreement).

229. *See, e.g.*, Jim Walter Resources, Inc. v. United Mine Workers of America, District 20, Local Union 2394, 88-1 ARB ¶ 8026 (1987) (Feldman, Arb.) (where the arbitrator ordered that proportionate wages be paid to three grievants rather than the entire group of mechanics who could have performed the contract at work).

230. *See* McElroy Coal Co./McElroy Mine v. United Mine Workers of America, District 6, Local 1638, 93 Lab. Arb. (BNA) 566 (1989) (McIntosh, Arb.) (where the arbitrator denied monetary relief due to the absence of supporting evidence); Cannelton Industries, Inc., Kanawha Div. v. United Mine Workers of America, District 17, Local 8843, 90 Lab. Arb. (BNA) 705 (1988) (Stoltenberg, Arb.) (where the arbitrator limited the company's liability because of the union's conflicting evidence on the number of days that the contracted work consumed).

When grievances arising out of this conduct reach arbitration, a key issue may be the applicability of *res judicata* principles as enunciated in ARB No. 78-24. In recent cases employers have tested the limits of preexisting arbitration awards by engaging in further subcontracting.[231]

3. Supervisory Performance of Unit Work

The UMWA has been most successful in work assignment disputes that deal with supervisory performance of unit work. It has won almost 65% of the reported supervisory performance cases decided during the study period.

Article IA, Section (c) prohibits supervisory employees from performing classified work unless the work is necessary to training or instructing classified employees or is performed to meet an emergency.[232] Demonstrating a preference for work preservation in close cases, that provision imposes the burden of proof on the employer to prove the nonperformance or proper performance of unit work by supervisory personnel.[233]

Where employers have been successful, they have shown that supervisors were instructing unit employees or doing work that was *di minimus*.[234] Recently, in *Cannelton Industries v. United Mine Workers of America, District 17, Local Union 8043*,[235] the arbitrator read the "emergency" exception in Article IA, Section (c) to cover employer attempts to meet business exigencies by using non-unit

231. *See, e.g.*, McElroy Coal Co. and United Mine Workers of America District 6, Local 1638, 93 Lab. Arb. (BNA) 566 (1989) (McIntosh, Arb.).

232. *See supra* note 189. Under the Agreement classified work describes unit work — work to be done by employees represented by the union.

233. *But see* Consolidation Coal Co., Mathews Mine v. United Mine Workers of America, District 19, Local 1569, 65 Lab. Arb. (BNA) 892 (1975) (Stokes, Arb.) (where the arbitrator denied the grievance because the grievant had not submitted any facts in support of its allegations in a case where the employer's facts were weak).

234. *See* Consolidation Coal Co., Mathews Mine v. United Mine Workers of America, District 19, Local 1569, 65 Lab. Arb. (BNA) 414 (1975) (Stokes, Arb.); Consolidation Coal Co., Mathews Mine v. United Mine Workers of America, District 19, Local 1569, 65 Lab. Arb. (BNA) 892 (1975) (Stokes, Arb.); United States Steel Corp. v. United Mine Workers of America, District 19, Local 7425, 66 Lab. Arb. (BNA) 925 (1976) (Cantor, Arb.).

235. 90 Lab. Arb. (BNA) 824 (1988) (Stoltenberg, Arb.).

employees including a supervisor where employees made themselves unavailable for work.[236]

Remedially, arbitrators have limited recoveries to actual wages lost and cease and desist orders. They have been unwilling to impose penalties not supported by contractual provisions.[237]

D. Seniority Cases

Seniority under the Agreement, like a small minority of seniority provisions in other industries,[238] is based on a combination of length of service and job qualifications. Article XVII, Section (a) defines seniority as follows:

> Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded.

The highest incidence of grievances in published seniority cases concerns filling vacancies, bumping rights during layoffs,[239] recalls from layoff panels and job postings. The question of ability to step into and perform the work pervades the first three categories and is the greatest source of seniority disputes.

1. Ability to Perform

Employers are typically successful where a grievance protests denial of an employment opportunity because of inability to perform

---

236. *Id.* at 828-29. *Cf.* Central Appalachian's Coal Co. v. United Mine Workers of America, District 17, Local 9619, 64 Lab. Arb. (BNA) 787 (1975) (Hunter, Arb.) (where the arbitrator granted the grievance, since the grievant's honoring of a non-work related picket line was deemed to not constitute an unauthorized work stoppage).

237. *See, e.g.*, Barnes & Tucker Co. v. United Mine Workers, District 2, Local 1269, 85-1 ARB ¶ 8307 (1985) (Feldman, Arb.) (where the arbitrator refused to impose punitive damages in the absence of contractual support, even though the employer had been a repeat offender. Arbitrator Feldman noted that his authority was limited "only to [making] the person whole," and that he was not to penalize the employer in the absence of contractual authority).

238. *See* 2 Collective Bargaining Negotiations and Contracts Basic Patterns, 75:1 (1989).

239. A senior employee's right to displace a more junior employee whose job the senior can perform is a bumping right.

the work.[240] However, the union has prevailed in a number of ability to perform disputes, where the employer's method of evaluation, fairness in administration of ability testing, and evaluation criteria were called into question. For example, in *Consolidation Coal Co. v. United Mine Workers of America, District No.6, Local 7690*,[241] the arbitrator acknowledged the "presumption of legitimacy" to be accorded management decisions related to filling vacancies and the union's burden of showing management decisions to be arbitrary or discriminatory.[242] The arbitrator explained:

> This [presumption of legitimacy and union burden of proof are] firmly rooted in management's expressly reserved and multi- faceted right to run the enterprise by determining the nature and extent of the work, directing the methods by which it is to be accomplished, setting standards of production and measuring the performance of its employees.[243]

Squarely within the scope of this right and essential to its effective exercise, lies management's authority to evaluate the qualifications of its employees against the requirements of positions at the mine. Management does not, however, have an entirely free hand

---

240. *Filling Vacancies*

See, e.g., Jim Walter Resources, Inc., v. United Mine Workers of America, District 20, Local 2368, 80 Lab. Arb. (BNA) 915 (1983) (Clarke, Arb.); Emery Mining Corp. v. United Mine Workers of America, District 22, Local 1769, 85 Lab. Arb. (BNA) 1211 (1985) (Feldman, Arb.); Saganaw Mining Co. v. United Mine Workers of America, Local 9695, 86 Lab. Arb. (BNA) 943 (1986) (Stoltenberg, Arb.); Peabody Coal Co., v. United Mine Workers of America, District 23, Local 1793, 87 Lab. Arb. (BNA) 758 (1985) (Volz, Arb.); Old Ben Coal Co. v. United Mine Workers, District 11, Local 5179, 77-1 ARB ¶ 8037 (1977) (Witney, Arb.); Southern Ohio Coal Co. v. United Mine Workers of America, District No. 6, Local No. 1890, 82-2 ARB ¶ 8417 (1982) (Ruben, Arb.); Peabody Coal Co. v. United Mine Workers of America, District 23, Local 1793, 90 Lab. Arb. (BNA) 556 (1987) (Feldman, Arb.); Alabama By-Products Corp. v. United Mine Workers, District 20, Local 1288, 77-1 ARB ¶ 8302 (1977) (Grooms, Arb.).

Layoffs

Shrewsbury Coal Co. v. United Mine Workers of America, Local No. 340, 86-2 ARB ¶ 8440 (1986) (Duff, Arb.); Arch of West Virginia, Inc. v. United Mine Workers of America, District 17, Local 5851, 89-1 ARB ¶ 8064 (1988) (Lieberman, Arb.); Hawks Nest Mining Co. v. United Mine Workers of America, District 17, Local 3029, 92 Lab. Arb. (BNA) 414 (1989) (Volz, Arb.).

Layoff Panels

Shrewsbury Coal Co. v. United Mine Workers, Local No. 1054, 85-2 ARB ¶ 8547 (1985) (Duff, Arb.); Kelley Coal Co. v. United Mine Workers of America, Local 2343, 85-2 ARB ¶ 8357 (1985) (Probst, Arb.); Amherst Coal Co. v. United Mine Workers of America, Local 5958, District 17, 86-2 ARB ¶ 8604 (1986) (Heekin, Arb.).

241. 77 Lab. Arb. (BNA) 785 (1981) (Ruben, Arb.).

242. *Id.* at 789.

243. *Id.*

in the matter, for it is obligated to post all permanent vacancies for bidding and award each job to the most senior employee who has the immediate ability to perform the job.[244] In determining whether management has met its obligations, arbitrators recognize that ascertaining an employee's "ability" often involves a judgment call. Because it is the primary responsibility of management to make such judgments and because it has superior knowledge both of the details and duties of the job and of the relevant qualifications of the employee, its judgments command respect and are not lightly to be disregarded.

Yet, in *Consolidation Coal Co.*[245] the arbitrator sustained the grievance of a first class mechanic in the Dozer Garage who had been passed over in favor of a more junior employee for a similar job in the Shovel Maintenance Department. The grievant had been denied the position, because he failed an *ad hoc* quiz, developed by the superintendent of the Shovel Maintenance Department and based on events that occurred in the Shovel Maintenance Department on the day of the quiz.[246] The arbitrator noted that written and oral examinations are appropriate means of determining ability.[247] The arbitrator further noted that employees may also qualify for a job by experience, by receiving a favorable review of the overall performance file, and by passing an actual performance test.[248] He pointed out, however, in the following terms that written and oral examinations must themselves meet certain tests:

> First, the test must be "valid." By that, the arbitrator means that the test must actually measure the particular element which it sets out to evaluate. In the present case, the test given by the company must have accurately measured the grievant's then ability to maintain and repair the shovels and drills assigned to the bull crew.
>
> Second, the test must be reliable. By this the arbitrator means that it must consistently be able to separate out those who have the ability from those who do not. Thus, if a significant number of candidates "pass" the test, who in fact do not have the requisite job ability, or, if a significant number of candidates "*fail*"

244. *See* discussion *infra* at notes 255-66 and accompanying text.
245. 77 Lab. Arb. (BNA) 785 (1981) (Ruben, Arb.).
246. *Id.* at 786.
247. *Id.* at 791.
248. *Id.* at 790.

the test, who in fact *do* have the requisite job ability, then the test is not reliable.[249]

Noting that 75% of the questions only "tested [the grievant's] nominal familiarity with the equipment serviced by [mechanics in the Shovel Maintenance Department]," the arbitrator held the test administered by the employer invalid.[250] It did not afford the grievant an adequate opportunity to demonstrate his ability or management an adequate opportunity to fairly consider the grievant's ability. The arbitrator awarded the grievant a five- day trial period to make out such a demonstration.

Similarly, in *Arch of Illinois v. United Mine Workers of America, District 12, Local 1392*,[251] a realignment case, the arbitrator sustained a grievance concerning a test used to determine the grievant's ability to perform the work. In that case the grievant complained about the conclusions drawn from the test rather than the validity of the test itself. The arbitrator affirmed the prevailing standard of review — that an arbitrator is limited to reviewing an employer's qualifications decisions for arbitrariness and capriciousness.[252] For the arbitrator, that standard amounted to an inquiry about whether the employer's reasons for finding an inability to perform were supported by the evidence.[253] After identifying the reasons given by the employer and analyzing the evidence in support of each reason, the arbitrator found that the employer's conclusions were not supported by the evidence.[254]

2. Job Postings

Grievants have been very successful in job posting cases, even though they involve management's right to direct the working force clearly set out in Article IA, Section (d).[255] As noted by Chief Umpire Paul L. Selby, Jr. in ARB No. 78-26, job posting cases deal with

249. *Id.* at 791.
250. *Id.*
251. 94 Lab. Arb. (BNA) 376 (1990) (Fullmer, Arb.).
252. *Id.* at 378-79.
253. *Id.* at 379.
254. *Id.* at 378-80.
255. Arbitrators sustained five of the eight grievances related to job postings (62.5%) published during the study.

a "relationship between . . . management rights and bargaining unit rights."[256] Arbitrator Selby notes that while management has the inherent power to direct the working force, that power is specifically limited by various provisions of the Agreement, including Article XVII, Section (i), governing job bidding.[257]

However, the bargaining rights secured by Article XVII, Section (i), do not prevent an employer from exercising its inherent authority to determine whether permanent vacancies or new jobs exist. They merely require the employer to fill such vacancies in a prescribed manner.[258] Yet, such vacancies or new jobs need not be formally announced in order to fall within the Article XVII, Section (i) limitation. Vacancies triggering the posting obligation may be shown by the employer's "actions, direction of work duties, and administration of work tasks."[259] Where the grievant shows the employer to have established a vacancy or new job, the arbitral ordering of a job posting is an appropriate remedy.[260]

Job posting cases arise in a number of contexts, for example, as challenges to the supervisory performance of unit work,[261] the filling of vacancies by temporary classifications under Article IV, Section (e), rather than job posting,[262] the changing of duties and responsibilities of a job after the vacancy occurs,[263] and the treatment

---

256. ARB No. 78-26 (1980).

257. Article XVII reads in part:

Section i. Job Bidding

Filling of all permanent vacancies and new jobs created during the term of this Agreement will be made on the basis of mine seniority as set forth in the following procedure.

1. The job or vacancy shall be posted . . . .

258. *See* ARB No. 78-26 at 15.

259. *Id.* AMAX Coal Co. v. United Mine Workers of America, District 11, Local 1216, 81-1 ARB ¶ 8211 (1981) (Sinicropi, Arb.).

260. *See* ARB No. 78-26 at 17. *See, e.g.*, Jim Walter Resources, Inc. v. United Mine Workers of America, District 20, Local 2368, 85 Lab. Arb. (BNA) 290 (1985) (Feldman, Arb.).

261. *See* ARB No. 78-26; Sewell Coal Co. v. United Mine Workers of America, District 29, Local 6207, 73 Lab. Arb. (BNA) 126 (1979) (Wren, Arb.) (where the arbitrator found that the job of fire boss was not classified work as determined by past practice).

262. *Id.* (where the arbitrator held that the employer could not circumvent its obligation under Article XVII, Section (i) by using the temporary assignment procedure to give an employee a regular job).

263. North River Energy Co. v. United Mine Workers of America, District 20, 85 Lab. Arb. (BNA) 449 (1985) (Witney, Arb.) (where the arbitrator held that the employer could not circumvent

of a vacancy as temporary rather than permanent.[264] The success of grievants in job posting cases shows that arbitrators take seriously the limitations on management rights found in Article XVII, Section (i).[265]

Like typical seniority provisions those under the Agreement touch many aspects of the employment relationship. Specifically, Article XVII of the Agreement addresses the definition of Seniority, Reduction and Realignment, Layoff Procedure, Rules Governing Panels, Recall Rights, Job Bidding, Training for Vacancy Not Filled By Bidding, Transfer to Other Mines of Employer, Leave of Absence, Loss of Seniority for Taking Supervisory Positions, and Shift Preference. Despite the many provisions of Article XVII, seniority is also important to other provisions of the Agreement such as Articles V (promotion of helpers) and XVI (training opportunities).[266] Perhaps, as an affirmation of the acceptance of seniority as a principal criterion for distributing employment preferences, seniority cases constituted only about 14% of the issues decided in the published cases during the study period.[267] All but two of those, *Armco, Inc., Armco Coal Operations and United Mine Workers of America, District 17, Local 6608*,[268] and *Alabama By- Products Corp. and United*

---

the posting requirement after departing employees left vacancies by reducing the responsibilities of remaining employees and posting a lesser position). *See also* Consolidation Coal Co. v. United Mine Workers of America, District 31, Local Union 1588, 88-2 ARB ¶ 8423 (1988) (Wren, Arb.) (where the arbitrator found that an employer could not arbitrarily transfer the duties of a job to a different job in order to avoid posting the former).

264. *See* ARB No. 78-26. *See also* Consolidation Coal Co. v. United Mine Workers of America, District 6, Local 1784, 84-2 ARB,¶ 8582 (1984) (Feldman, Arb.) (where the Arbitrator found that the third shift constituted a permanent vacancy, because the employer used a makeshift crew for a substantial period). *Cf.* Consolidation Coal Co. v. United Mine Workers of America, Local 9690, 85-1 ARB ¶ 8045, (1984) (Probst, Arb.) (where the arbitrator held that the union did not meet its burden of proving that the employer had defined a permanent vacancy by active decision or in substance).

265. Grievants won five of eight (62.5%) of the job posting cases.

266. Article XVI, Section (g) makes the selection of employees for training opportunities a function of seniority and trainability. Under some circumstances involving senior employees Article XVII, Section (i)(11) limits a fully trained helper's right under Article V, Section (b) to be promoted to the machine operator's job.

267. Fifty-two of the 368 cases reported during the study period dealt with seniority issues.

268. 79 Lab. Arb. (BNA) 330 (1982) (Wren, Arb.) (dealing with employee entitlement to a separate seniority unit at a new mine).

Mine Workers of America, District 20, Local 1881,[269] dealt with layoff, panel or job vacancy issues.

E. Safety and Health Issues

Article III of the Agreement contains thirteen provisions that seek to preserve and improve the safety and healthfulness of the mining environment.[270] As Section (b) reveals, the Federal Mine Safety and Health Act of 1977 is integral to the rights and obligations undertaken by the parties in Article III.[271] In addition to the Joint Industry Health and Safety Committee,[272] Article III establishes a Mine Health and Safety Committee (MHSC or Committee) at each mine.[273] The MHSC is made up of miners employed at the mine and is responsible for regularly inspecting the "mine and surface installations, dams or waste impoundments and gob piles connected therewith" for conditions that may endanger the lives or bodies of employees.[274] In carrying out those duties, the MHSC must report its findings and recommendations to the employer and, in extreme cases, may cause the closing down of dangerous areas of the mine.[275]

---

269. 83 Lab. Arb. (BNA) 1270 (1984) (Clarke, Arb.) (dealing with seniority entitlement to vacation work).

270. *See* Article III, Sections (a)-(p) of the 1988 Agreement. Section (a) sets forth the basic right to a safe working place in the following terms:

> Every Employee covered by this Agreement is entitled to a safe and healthful place to work, and the parties jointly pledge their individual and joint efforts to attain and maintain this objective. Recognizing that the health and safety of the Employees covered by this Agreement are the highest priorities of the parties, the parties agree to comply fully with all lawful notices and orders issued pursuant to the Federal Mine Safety and Health Act of 1977, as amended, and pursuant to the various state mining laws.

271. In part, Section 801 of Title 30, U.S. Code Annotated, reads:

> (g) It is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the nation's coal or other miners; (2) to require each operator of a coal or other mine and every miner in such mine, comply with such standards; (3) to cooperate with and provide assistance to the states in the development and enforcement of effective state coal or other mine health and safety programs and (4) to improve and expand, in cooperation with the States and the coal or mining industry, research and development and training programs aimed at prevented coal or other mine accidents and occupationally caused diseases in the industry.

272. *See* Article III, Section (c).

273. *See* Article III, Section (d).

274. *See* Article III, Section (d)(3).

275. *Id.*

Article III, Section (i) also creates individual safety rights that permit employees to refuse to work under conditions that are reasonably believed to be abnormally dangerous.[276] Article III, Section (p) establishes a special expedited dispute settlement procedure for safety and health disputes.[277] The procedures integrate the functions of the MHSC, the Mine Safety and Health Administration and the Arbitrator.[278]

1. Safety

Surprisingly few of the published cases during the study period directly involved safety disputes.[279] The more interesting published cases involved MHSC conduct and individual safety rights.

As noted, the MHSC enjoys the authority to inspect, report and recommend, and in extreme cases, close down mining facilities.[280] Belief in "imminent danger" justifies a MHSC decision to close an area of the mine.[281] Such a closure subjects Committee members or the entire Committee to the sanction of removal, where the employer can prove the MHSC or some of its members acted arbitrarily and capriciously.[282]

---

276. *See supra* note 141.

277. *See* Appendix VII.

278. *See* Article III, Section (p).

279. Seventeen of the 368 cases or 4.6% directly involved safety issues. Another five cases, indirectly involved safety questions while falling into other issue categories. *See, e.g.*, Eastern Coal Corp. v. United Mine Workers of America, District 30, Local 5737, 89 Lab. Arb. (BNA) 759 (1987) (Hewitt, Arb.).

280. Relevant provisions of Article III read as follows:

Section (d) Mine Health and Safety Committee . . .

(3) The Mine Health and Safety Committee may inspect any portion of a mine or surface installations, dams or waste impoundments, and gob piles connected therewith. If the Committee believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. In those special instances where the Committee believes that an eminent danger exists and the Committee recommends that the Employer remove all Employees from the involved area, the Employer is required to follow the Committee's recommendation and remove the Employees from the involved area immediately . . . .

281. *Id.*

282. This authority is contained in Article III, Section (d)(5) which reads in part as follows: "If the Mine Health and Safety Committee, in closing down an area of the mine, acts arbitrarily and capriciously, a member or members of such Committee may be removed from the Committee . . . ."

The ARB has explained the difference between "endangerment" and "imminent danger" under Article III, Section (d)(3).[283] When the Committee believes that conditions "endanger" the lives and bodies of employees, it can report its findings and recommendations to the Employer.[284] "Endangerment" assumes that the peril is sufficiently remote to reasonably permit employees to continue working while remedial action is considered and undertaken.[285] On the other hand, "imminent danger" connotes "extraordinary urgency" and is synonymous with impending disaster. Only in such circumstances can the proximity of the danger warrant the instant remedial action of closing an area.[286] This distinction suggests that Committee members must act with care when invoking the more drastic remedy of area closedown.

In removal cases that reach arbitration, the arbitrator will review Committee action to determine whether it was based on a reasonable belief that an imminent danger existed. Doing so entails a review of the facts that were available to the grievant at the time of the closedown decision as well as the grievant's testimony about how the decision was reached. The "reasonable belief" standard gives considerable discretion to the reviewing arbitrator and little predictability to Committee members.[287] In ARB No. 63, the ARB, speaking through Chief Umpire Rolf Valtin, acknowledged the subjective component of this standard and held that reasonable belief

283. ARB No. 63 (1977).

284. *See* Article III, Section (d)(3).

285. *See* ARB No. 63, 1-6.

286. *See* ARB No. 63, 5-8. The ARB likened this standard to that governing the individual's right to refuse to perform assigned work under Article III, Section (i). *Id.* at 10. The ARB also rejected the view that the MHSC's belief must be objectively based in order for its members to avoid removal. Saying that Article III, Section (d)(5) does not remove the right to err in good faith, the ARB described the standard as follows: "there must be something of colorable substance in the picture that inclines one to acceptance of genuineness and reasonableness of belief on the part of the Committee." *Id.* at 9.

287. *See* Consolidation Coal Co. v. United Mine Workers of America, Local 1473, 68 Lab. Arb. (BNA) 405 (1977) (Perry, Arb.) (where the arbitrator found that the grievant's failure to close down an area at an earlier time coupled with his testimony about why he closed it later, demonstrated that he did not believe an eminent danger existed) *Cf.* North American Coal Corp. v. United Mine Workers of America, Local 2262, 68 Lab. Arb. (BNA) 720 (1977) (Perry, Arb.) (where the arbitrator found that the grievant had a legitimate basis for reasonably believing that an eminent danger existed, even though other evidence suggested that the grievant's belief was wrong).

must be determined as of the time of the imminent danger notice and not upon objective facts as examined under the "cold scrutiny of informed hindsight."[288] Where removal is appropriate, its duration is for the term of the contract.[289]

Just as MHSC members may close imminently dangerous areas of the mine, individual employees may refuse to work under conditions reasonably believed "to be abnormally and immediately dangerous." The MHSC is also involved in individual safety rights disputes. When an Employee insists upon being relieved from assignments that are perceived to be immediately and abnormally dangerous, at least one member of the MHSC reviews the disputed condition with mine management within four hours of the employee's notice.[290] If the MHSC and management agree that the condition does not exist, the employee must return to the assignment.[291]

It is not surprising that the "abnormally and immediately dangerous" clause has required interpretation by arbitrators.[292] As the

---

288. ARB No. 63, 9-10.

289. Consolidation Coal Co. v. United Mine Workers of America, District 6, Division 4, Local 1473, 71 Lab. Arb. (BNA) 257 (1978) (Ipavec, Arb.).

290. If the parties do not agree, the dispute is ultimately decided by a government official or an arbitrator. Article III, Section (i) reads in part:

> Section (i) Preservation of Individual Safety Rights . . . . If the existence of such condition is disputed, at least one member of the Mine Health and Safety Committee shall review such condition with mine management with four (4) hours to determine whether it exists and each party shall state the facts upon which it relies as to whether such condition exists or does not exist. If there is *agreement* between the Mine Health and Safety Committee member or members and in mine management that the condition does not exist, the Employee shall return to his regular job immediately (emphasis added).
>
> (3) If the dispute remains unsettled following the investigation by a member of the Mine Health and Safety Committee and involves an issue concerning compliance with federal or state mine safety laws or mandatory health or safety regulations, the appropriate federal or state inspection agency shall be called in immediately and the dispute shall be settled on the basis of the findings of the inspector with both parties reserving all rights of statutory appeal. Should the federal or state inspector find that the condition complained of requires correction before the Employee may return to his job, the Employer shall take the corrective action immediately. Upon correction, the complaining Employee shall return to his job. If the Federal or State inspector does not find a condition requiring correction, the complaining employee shall return to his job immediately.
>
> (4) For disputes not otherwise settled, a written grievance shall be filed no later than five working days after the findings of the inspector and the dispute shall be referred immediately to step 3 as provided for in Article XXIII, Settlement of Disputes, Section (c)(3) . . . .

291. *Id.*

292. The full clause found in Article III, Section (i) is:

following quote shows, such interpretation grows out of a sensitivity to the importance of safety rights as well as the potential for their misuse:

> The preservation of individual safety rights under the terms of the wage agreement is an important if not the most important provision negotiated by the Union over the sequence of the labor negotiations. It is important that nothing would diminish the protection gained by the miners over the years. On the other hand, it is equally as important to protect the parties from any misuse of the provisions that have been gained by the use of Article III, Section (i) for purposes other than immediate avoidance of what the Employee believes to be an immediate danger.[293]

Thus, an arbitrator will closely examine the circumstances of an employee's refusal to work to determine whether conditions were "immediately dangerous."

Arbitrators have equated the language of Article III, Section (i) — "abnormally and immediately dangerous" — to the "imminent danger" language of Section (d) governing the MHSC's closedown of areas of the mine.[294] The ARB endorsed this view in ARB No. 63. Thus, the perceived danger to employees invoking their individual safety rights under Article III, Section (i) must be imminent within the meaning of Article III, section (d).

The "imminence" requirement heightens an arbitrators scrutiny of conditions cited as justifying *ex ante* an employee's refusal to work. For example, in *Southern Ohio Coal Co., Meig's No. 2 Mine and United Mine Workers of America, Local 1886*,[295] the grievants

---

abnormally and immediately dangerous . . . beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

293. Southern Ohio Coal Co. v. United Mine Workers of America, Local 1886, 72 Lab. Arb. (BNA) 677, 681 (1979) (Van Pelt, Arb.).

294. In *Southern Ohio Coal Co., id.*, Arbitrator Van Pelt held that "immediately dangerous" was to be interpreted the same as "imminent danger" found in the Federal Mine Health and Safety Act and the Ohio Statutes. Section 802 (J) of 30 U.S.C.A. contains the following definition:

> Imminent danger means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

Cf. Article III, Section (i) of the Agreement, which refers to conditions believed to be "abnormally and immediately dangerous to [the Employee] beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

295. 72 Lab. Arb. (BNA) 677 (1979) (Van Pelt, Arb.).

claimed their invocation of Article III, Section (i) was proper, because they were being asked to serve under a supervisor who had earlier permitted the existence of a dangerous condition.[296] Pointing to the Union's evidence of only one instance of supervisory negligence, the arbitrator observed that the Union's position required a finding that an imminent danger existed whenever the supervisor was present.[297] Finding no evidence to support such a claim, the arbitrator went further to hold that an individual could not be an imminent danger under Article III, Section (i).[298] While the latter pronouncement may be an overstatement, the arbitrator's conclusion does reveal the potential difficulty in establishing "imminence."

To guard against the abuse of individual safety rights, Article III, Section (i)(4) subjects to discipline employees not invoking their safety rights in good faith.[299] Is good faith under Section (i)(4) synonymous with reasonable belief under Section (i)(1). Since reasonable belief under (i)(1) is a prerequisite for receiving lost earnings due to the invocation of individual safety rights, it can be read as unrelated to the concept of good faith that bears upon the imposition of discipline. The issue is somewhat complicated by the language of good faith contained in Section (i)(1), the invocation provision. The apparently interchangeable use of the terms "good faith" and "reasonable grounds to believe" in the same provision, suggests they may be indistinguishable.

Arbitrator George W. Van Pelt in *Southern Ohio Coal Co.*,[300] made concurrent findings that the grievants did not have reasonable cause to believe that an imminent danger existed but exercised their

296. *Id.* at 680.
297. *Id.* at 681-82.
298. *Id.* at 682.
299. Article III, Section (i)(4) provides in part:

In those instances where determination has been made, as provided above, that an Employee did not act in good faith in exercising his rights under the provisions of this Agreement, he shall be subject to appropriate disciplinary action, subject, however, to his right to file and process a grievance. In no event, however, shall such discipline for failure to act in good faith be imposed prior to the review between at least one member of the Mine Health and Safety Committee and mine management required under paragraph (2) of this Section (i).

300. 72 Lab. Arb. (BNA) 677.

rights under Article III, Section (i) in good faith. The arbitrator reasoned as follows:

> Good faith must, by necessity, encompass the intention of the individual. One who is not acting in good faith would be acting for a purpose not intended to be utilized under the guise the person claims and with full knowledge of that person that it is not the true reason. An example would be to claim that an act of a foreman or a company was unsafe to attain revenge because of a personal grudge. In this case, from the testimony, the Arbitrator is convinced that the grievants honestly believed — even though mistakenly so — that they were acting within their rights and that the supervisor did constitute a danger . . . . While they were wrong in their belief, they nonetheless believed that their actions were proper and . . . they had no improper motive in claiming their rights under Article III(i). The Arbitrator cannot find that they acted in bad faith.[301]

This interpretation of Section (i) protects employers from abuse while precluding a chilling effect on the exercise of individual safety rights.

In recognizing the importance of individual safety rights arbitrators interpret Section (i) as imposing upon employers the burden of proving the absence of good faith.[302] Since the assignment of burden of proof often reflects certain policy choices,[303] the employer's burden of proving bad faith in individual safety rights cases favors employee invocation of safety rights without fear of discipline. The unfettered freedom to make legitimate safety claims necessarily will result in greater safety protection.

However, arbitrators do not uniformly assign the burden of proof to employers in Article III, Section (i) cases. For example, Arbitrator Samuel S. Perry in *Southern Ohio Coal Co., Meigs Mine No. 1 v. United Mine Workers of America, Local 1890*,[304] treated the individual safety rights claim under Article III, Section (i) as any other non-disciplinary case that imposes a burden on the Union to prove the claim. The grievants' complaint about management's failure to assign him to other available work after he invoked his safety rights, raised an issue about whether other work was available. Arbitrator Perry denied the grievance in part because the Union had not shown

---

301. *Id.* at 682.

302. *See, e.g.*, Energy Mines, Inc., v. United Mine Workers of America, District 5, Local 1197, 87 Lab. Arb. (BNA) 577 (1986) (Hewitt, Arb.).

303. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 7.8, 324-25 (3d ed. 1985).

304. 77-2 ARB ¶ 8471 (1977) (Perry, Arb.).

other work to be available.[305] The individual safety rights enjoyed by mining employees under Article III, Section (i) would seem to warrant an exception to the general rule that assigns the burden of proof to the grievant in non-disciplinary cases.

Other safety issues decided during the study period involved the employers' duty to provide efficient means of transporting injured or sick employees,[306] whether an employer can require a maintenance employee to sign inspection reports signifying the soundness of inspected mine equipment,[307] whether an employer violated provisions of the special health and safety problems section of Article XXI,[308] and whether an employer is obligated under the Agreement to continue the practice of furnishing injury and illness reports to affected employees upon request.[309] Grievants tend to prevail in these cases, another indication of the sensitivity of arbitrators to the safety concerns of mine employees.[310]

2. Health

In a comprehensive article published in an earlier Coal Issue of this Law Review, Professor Marlin M. Volz comprehensively discussed the many sections of the Agreement of 1984 that concern health and retirement benefits and health and safety matters.[311] Pro-

---

305. *Id.* at 5040.

306. *See* United States Steel Corp. v. United Mine Workers of America, District 19, Local 7425, 65 Lab. Arb. (BNA) 345 (1975) (Sherman, Arb.) (where the arbitrator, under the circumstances, denied grievances alleging that the Employer had failed to provide "safe, quick and efficient means of transporting injured or sick Employees" and failed to provide a "safe man trip for every miner as transportation in and out of the mines." *Id.* at 347.

307. *See* Cedar Coal Co. v. United Mine Workers of America, Local 1766, 75 Lab. Arb. (BNA) 224 (1980) (Wren, Arb.) (where the arbitrator sustained the grievance of a maintenance Employee who would have exposed himself to the risk of litigation if required to sign such inspection reports).

308. *See* Peabody Coal Co. v. United Mine Workers of America, District 23, Local 9800 & 1894, 77-2 ARB ¶ 8415 (1977) (Witney, Arb.) (where the arbitrator denied the grievance requesting a flagman at the intersection of a haulage and public roads under Article XXI, Section (e)(8) requiring safeguards at such a crossing).

309. *See* AMAX Coal Co. v. United Mine Workers of America, District 12, Local Union No. 7031, 87-1 ARB ¶ 8096 (1986) (Clarke, Arb.) (where the arbitrator sustained the grievance, holding that the employer was obligated under Article III, Section (f) and Article XXVI, Section (b) to maintain the practice).

310. Approximately 61% of the cases in this category are won by grievants as shown in Appendix I.

311. *See* Volz, *Medical and Health Issues in Coal Arbitration*, 89 W. VA. L. REV. 725 (1987).

fessor Volz pointed out that 55 sections of the Agreement deal with health matters. This Article will not duplicate Professor Volz' efforts. Rather, it will simply note that thirteen cases published during the study period dealt strictly with health matters. Of that thirteen, nine or about 70% concerned the right of Employees to sickness and accident benefits under Article XI of the Agreement.[312]

F. Other Issues

Other significant issues treated by arbitrators during the study period involved management promulgation of work rules, scheduling of work, working conditions, successorship problems, management rights and union security, discrimination, and procedure. The following discussion will highlight these issues paying some attention to observable trends and incisive arbitral reasoning in the published

---

312. *See* Southern Ohio Coal Co. v. United Mine Workers of America, Local 1886, District 6, 80 Lab. Arb. (BNA) 885 (1983) (Stoltenberg, Arb.); Alabama By-Products Corp. v. United Mine Workers of America, District 20, Local 1288, 79-2 ARB ¶ 8425 (1979) (Clarke, Arb.); Yates Energy & Development, Inc. v. United Miner Workers of America, District 14, Local No. 2498, 84-2 ARB ¶ 8374 (1984) (Roberts, Arb.); Southern Ohio Coal Co. v. United Mine Workers of America, Local 1949, 85-2 ARB ¶ 8452 (1985) (Probst, Arb.) (all dealing with the propriety of denying sickness and accident benefits). Two of the thirteen cases (15%), Consolidation Coal Co. v. United Mine Workers of America, District 4, Local 1980, 83 Lab. Arb. (BNA) 927 (1984) (Duff, Arb.) and Allen Creek Coal Co. v. United Mine Workers of America, District 31, Local 1466, 86-1 ARB ¶ 8021 (1985) (Feldman, Arb.), dealt with eligibility issues such as whether a chiropractor can certify the employee's illness and whether a recall notice activates the employee's status for purposes of determining entitlement to benefits.

See also Jim Walter Resources, Inc. v. United Mine Workers of America, District 20, Local 1928, 79-2 ARB ¶ 8535 (1979) (Clarke, Arb.) (addressing the loss of eligibility for sickness and accident benefits under Article XI, Section (b), due to the Employee's acceptance of other employment while receiving such benefits); Peabody Coal Co. v. United Mine Workers of America, District 21, Local 1593 86-2 ARB ¶ 8359 (1986) (Gibson, Arb.) (dealing with whether the employer improperly influenced the conclusions of a neutral doctor who examined the employee's physical fitness to return to work from layoff - Article III, Section (j)). Cases dealing with employees' physical inability to perform under Article III, Section (j) *see* Peabody Coal Co v. United Mine Workers of America, District 6, Local 1188, 84 Lab. Arb. (BNA) 511 (1985) (Duda, Arb.) (refusal to recall from layoff); Consolidation Coal Co. v. United Mine Workers of America, District 6, Local 1110, 72-2 ARB ¶ 8406 (1977) (Dyke, Arb.) (refusal to recall from layoff); Donaldson Mining Co. v. United Mine Workers of America, District 17, Local Union 340, 90- 1 ARB ¶ 8052 (1989) (Zobrak, Arb.) (termination of employment); Peabody Coal Co. v. United Mine Workers of America, District 23, Local 1802, 83 Lab. Arb. (BNA) 1138 (1984) (Roberts, Arb.) (dealing with whether a final determination of 100% disability had been made under Article XIV, Section (c), thus affording a basis for non-disciplinary termination).

cases. The enumerated issues constitute approximately 26% of the decisions published during the study period.[313]

1. Work Rules

a. In General

Conforming to the general trend in arbitral decision-making, the unifying theme in published awards addressing work rule issues is the employer's reasonable exercise of rule making authority.[314] Under the Agreements from 1974 through 1988 the Employer has retained a management right to direct the working force under Article IA, Section (d).[315] Other provisions such as Article III, Section (g) deal-

313. Eighty-six of the 368 published awards (23.3%) involved cases falling into the other issues category. Thirteen of the cases involved employer work rules; 31 involved scheduling problems; 8 involved working conditions; 13 involved management rights and union security; 6 involved successorship issues; 5 involved discrimination; and 10 involved problems of procedure.

314. The following excerpts nicely summarize the dominant arbitral approach to work rule issues:

> It is well established in arbitration that management has the fundamental right unilaterally to establish reasonable plant rules not inconsistent with work or the collective agreement. Thus, when the agreement is silent upon the subject, management has the right to formulate and enforce plant rules as an ordinary and proper means of maintaining discipline and efficiency and of directing the conduct of the working force. Management also may establish and enforce plant rules to ensure the health and safety of Employees or others. . . .
>
> After plant rules are promulgated, they may be challenged through the grievance procedure (including arbitration) on the ground that they violate the agreement or that they are unfair, arbitrary, or discriminatory. Most Arbitrators find even in contractual provisions that specifically affirm the Employer's authority to promulgate plant rules a limitation that such rules must be reasonable.

See, e.g., Schine Body & Equipment Co. v. United Steel Workers of America, Local 8557, 69 Lab. Arb. (BNA) 930, 935-36 (1977) (Roberts, Arb.).

> This right to challenge applies also where the agreement expressly gives management the right to establish plant rules. Indeed, in many of the more recent plant rule cases management's general right to promulgate plant rules unilaterally was not challenged, such right being stated expressly in the agreement; the challenge rather was to the content or the particular application of some given rule . . . .
>
> The test of reasonableness of a plant rule "is whether or not the rule is reasonably related to a legitimate objective of management."

S. Robert Shaw Controls Co., 55 Lab. Arb. (BNA) 283, 286 (1970) (Block, Arb.). Elkouri and Elkouri, *How Arbitration Works*, (BNA) 553-55 (4th ed. 1985).

315. Article IA, Section (d) reads: "The management of the mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the Employer."

ing with employer rules for the protection of persons and property,[316] Article XXII, Section (i) setting out the rules governing attendance,[317] and Article XXVI, Section (b) specifying the role of local agreements and past practice under the Agreement,[318] have a bearing on the employer's promulgation and implementation of work rules.

Whether the employer's exercise of rule making authority is under its general right contained in Article IA or a specific contractual provision, the Arbitrator's ruling invariably encompasses an analysis of the practical concerns of reasonableness. Arbitrator Feldman applied such an analysis in *Nacco Mining Co., Powhatan Mine No. 6 v. United Mine Workers of America, District 6, Local 1810.*[319] In that case, the employer attempted to promote attendance at the mine by instituting an attendance lottery held monthly and paying five winners $100 each, provided that 25% of the work force were eligible to participate. Among other things, eligibility required completion of all scheduled work days and excluded any employee who left the mine early for any reason, including illness or injury.[320] Called upon to assess the reasonableness of the early leave exclusion from eligibility, the arbitrator noted the uniqueness of the attendance program and the following:

> Rules of necessity must meet certain requirements and standards. They must be:
>
> 1. Published

316. That Section provides:
Section (g) Safety Rules and Regulations:
Reasonable rules and regulations of the Employer, not inconsistent with Federal and State laws, for the protection of the persons of the Employees and preservation of property shall be complied with.
317. In part that provision reads:
Section (i) Attendance Control . . .
(3) Nothing in this section shall preclude the Employer from establishing or enforcing work rules regarding tardiness and leaving the shift early.
318. In part that provision reads:
Section (b) Prior Practice and Custom:
This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this agreement are hereby abolished. Except where abolished by mutual agreement of the parties, all prior practice and custom not in conflict with this Agreement shall be continued . . . .
319. 66 Lab. Arb. (BNA) 841 (1976) (Feldman, Arb.).
320. *Id.* at 842.

2. Reasonable
3. Even handedly applied
4. Not be violative of any contractual prohibition. (This may be considered part of the reasoning concerning the reasonableness of the rule.)[321]

The arbitrator considered the employer's legitimate interest in eliminating voluntary employee early departures to pursue activities that are preferred to completing the shift. He affirmed the impropriety of this employee conduct and distinguished early departures related to illness or injury as involuntary and not improper.[322] The arbitrator concluded that legitimate illness and injuries are contractually recognized as appropriate reasons to leave the work area and, hence, unreasonably used as a basis for denying eligibility for the attendance lottery.[323]

Past practice is an important constraint on an employer's rule making authority. Unless such practices are superseded by the Agreement, Article XXVI, Section (b) preserves their vitality.[324] In some cases, a threshold issue about whether a practice is binding may exist. For example, in *American Electric Power, Meigs Mine No. 2 v. United Mine Workers of America, Local 1886*[325] Arbitrator Abrams was confronted with the question of whether the employer's attendance program to control early departures from work could be

321. *Id.* at 843.

322. *Id.* at 843-44.

323. *See* Consolidation Coal Co. v. United Mine Workers of America, District No. 6, Local 1110, 69 Lab. Arb. (BNA) 145 (1977) (Ipavec, Arb.) (applying a similar analysis to find that the end rather than the beginning of the buzzer constitutes a more reasonable starting time for Employees under the circumstances); Southern Ohio Coal v. United Mine Workers of America, District 6, Division 1, Local 1886, 77-2 ARB ¶ 8516 (1977) (Dworkin, Arb.) (where the Arbitrator sustained the grievance of an employee who protested the employer's refusal to excuse his absence to drive his wife to the doctor); Consolidation Coal Co. v. United Mine Workers of America, District 6, Local 1110, 82-2 ARB ¶ 8405 (1982) (Nelson, Arb.) (where the arbitrator found unreasonable the employer's application of the tardiness rule to an employee who was late because of a mudslide).

324. *See, e.g.*, Saganaw Mining Co. v. United Mine Workers of America, District 6, Local 9695, 82 Lab. Arb. (BNA) 735 (1984) (where past practice prevented the employer from discontinuing the practice of giving written notification to employees and the union of monthly unexcused absences); Clinchfield Coal Co. v. United Mine Workers of America, District 28, Local 1476, 85 Lab. Arb. (BNA) 382 (1985) (Rybolt, Arb.) (where the arbitrator found the employer's absentee program to be not administered with sound judgment, since the employer without notice departed from the past practice of considering whether the employees absence was due to inclement weather before attaching the AWOL label).

325. 85-2 ARB ¶ 8360 (1985) (Abrams, Arb.).

unilaterally discontinued, despite the union's claim that past practice prevented it. In upholding the employer's unilateral right to discontinue the program, Arbitrator Abrams addressed the union's argument as follows:

> The mere fact that the Union was willing to go along with the company's Early Quit Control Program does not mean that the program was a Product of a joint agreement between the parties which became mutually binding as a "prior practice and custom" under the Wage Agreement. It was a management prerogative to create this Program, expressly reserved to it under Paragraph 3 of Article XXII (i) of the 1981 Wage Agreement. It remained the Company's prerogative to abolish that Program under Paragraph 3 of Article XXII(i) of the present Wage Agreement which contains precisely the same language.[326]

b. Drug Testing

Reflecting the National trend, published work rules cases involving drug testing are a recent phenomenon[327]. The first case published during the study period was decided on June 8, 1987,[328] and the latest was decided on October 28, 1988.[329] Only four such cases were published during the study period.[330]

Like other work rules cases, arbitrators evaluate drug testing rules to determine whether they are reasonably promulgated and implemented under the Agreement.[331] In addition to the employer's management right to direct the working force under Article IA Section (d), the Agreement permits an employer to promulgate reasonable safety rules (Article III, Section (g)) and to conduct physical ex-

---

326. *Id.* at 4494.

327. *See generally* Denenberg and Denenberg, *Drug Testing from the Arbitrator's Perspective*, 11 NOVA L. REV. 371, 371-73 (1987).

328. *See* Jim Walter Resources Corp. v. United Mine Workers of America, Local 1928, 89 Lab. Arb. (BNA) 147 (1987) (Nicholas, Arb.).

329. Sharpels Coal Co. v. United Mine Workers of America, District 17, Local 2935, 91 Lab. Arb. (BNA) 1065 (1988) (Stoltenberg, Arb.).

330. *See* Maple Meadow Mining v. United Mine Workers of America, District 29, Local 1961, 90 Lab. Arb. (BNA) 873 (1988) (Phelan, Arb.); Donaldson Mining Co. v. United Mine Workers of America, District 17, Local 340, 91 Lab. Arb. (BNA) 471 (1988) (Sobrak, Arb.).

331. *See* Peabody Coal Co. v. United Mine Workers of America, District 12, Local 9819, 92 Lab. Arb. (BNA) 658 (1989) (Hewitt, Arb.) (where the arbitrator denied the grievance in part because the "fully dressed" rule had been enforced without disparity). Donaldson Mining Co. v. United Mine Workers of America, District 17, Local 340, 91 Lab. Arb. (BNA) 471 (1988) (Sobrak, Arb.) (where the Arbitrator held the Employer's new drug testing policy to be not binding, because it had been unpublished and uncommunicated to Employees).

aminations of employees under some circumstances (Article III, Section (j)).[332] In ruling on questions of reasonableness coal industry arbitrators have been guided by the developing literature on drug testing. For example, in *Maple Meadow Mining v. United Mine Workers of America, District 29, Local 1961*,[333] the arbitrator struck down two components of the Employer's drug testing program as overly broad.[334] One component attempted to regulate off-duty conduct not necessarily having an impact on employment. And the other permitted random testing without reasonable cause and made a positive test result the basis for discipline.[335]

Article III, Section (g) requires some level of negotiations between the employer and the union, when the employer seeks to implement a safety rule, although the specific level is uncertain.[336] It is clear that the obligation does not include the necessity of agreement between the parties before the policy can be implemented.[337] Concerns about employee privacy, the delivery of test specimens and

---

332. Article III, Section (j) partially reads as follows:

(1) Physical examination, required as a condition of or in employment, should not be used other than to determine the physical condition or to contribute to the health and well-being of the Employee or Employees. The retention or displacement of Employees because of physical conditions shall not be used for the purpose of effecting discrimination.

(2) When a physical examination of a recalled Employee on a panel is conducted, the Employee shall be allowed to return to work at that mine unless he has a physical impairment which constitutes a potential hazard to himself or others.

(3) That once employed, an Employee cannot be terminated or refused recall from a panel or recall from sick or injured status for medical reasons over his objection without the concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents the Employee from performing his regular work. Each party shall bear the cost of examination by the physician as designated and shall share equally the cost of examination by the jointly designated physician.

(4) Where an Employer challenges the physical ability of an Employee or panel member to perform his regular work and is subsequently proven wrong, the Employee shall be compensated for time lost due to the Employer's challenge, including medical examination expenses incurred in proving his physical ability to perform the requirements of the job.

333. 90 Lab. Arb. (BNA) 873 (1988) (Phelan, Arb.).

334. *Id.* at 879-81.

335. *Id. See* Denenberg and Denenberg, *supra* note 327 at 398-402, 404-406.

336. In *Sharpels Coal Corp.*, 91 Lab. Arb. (BNA) 1065 (1988) (Stoltenberg, Arb.), the arbitrator held that a single meeting about the employer's proposed policy occurring within the contractual ten day period complied with the negotiation obligation.

337. *Id.*

overreaching in the regulation of legitimate drug uses are also reflected in arbitral reasoning.[338] Employee success rates in drug testing cases reflect the care that arbitrators are exercising in the protection of employee privacy rights.[339]

2. Work Scheduling Issues

a. In General

True in general and under the Agreement, the scheduling of work is an unassailable management right, if reasonably exercised.[340] The Agreement specifically reserves to management the right to direct the working force.[341] However, the Agreement is also richly laden with specific provisions that are uniformly held by Arbitrators to limit the broad grant of managerial power contained in Article IA, Section (d). During the study period, the two principal arbitration reporters published 31 cases dealing with shift, overtime, vacation, and idle days work scheduling issues.[342] In each of these areas the management right to schedule work has been circumscribed by specific provisions of the Agreement.

b. Shifts

Arbitrators ruled with employers in virtually every one of the shift scheduling cases.[343] An employer has the right under Article VIII, Section (c) to stagger the individual starting times of employees to achieve greater efficiency as well as safety in the mine.[344] Absent a past practice or contractual language to forbid it, an employer

338. *Id.*

339. Grievants have achieved full or partial victory in all of the published drug testing decisions during the study period. While the Frequency Table indicates three of four wins, that figure reflects two partial victories.

340. *See* Elkouri and Elkouri, *How Arbitration Works* (BNA), 519-29, 531-36 (4th ed. 1985).

341. *See* Article IA, Section (d).

342. Of the 31 cases published, employers won 22 or 71%. This high winning percentage attests, perhaps, to the dominant view among arbitrators that management authority reasonably exercised in this area should not be interfered with.

343. Five of seven or about 71% of the grievances were denied.

344. *See* Peabody Coal Co., Power Mine and United Mine Workers of America, District 14, Local 1122, 83-2 ARB ¶ 8339 (1983) (Gibson, Arb.).

may institute rotating shifts in the interest of efficiency.[345] A claim of past practice cannot defeat management's right to discontinue regular overtime when economic circumstances no longer warrant it.[346] The employer's right to manage the mine efficiently permits it to designate one of three rotating shifts as a maintenance shift, despite the union's claim that such a designation violates Article XIX, Section (c). Again, the management right prevails, where it is exercised to increase efficiency through raising productivity.[347] Similarly, management does not act arbitrarily, unreasonably, or capriciously, where it assigns a dispatcher to work a set shift rather than rotating shift.[348] Arbitrators have sustained shift scheduling grievances only where employers have violated specific limitations on the Article IA(d) management right, such as found in Article IV, Section (d)(3).[349]

---

345. Jim Walter Resources, Inc. and United Mine Workers of America, District 20, Local 2245, 77-1 ARB. ¶ 8134 (1977) (Grooms, Arb.). The arbitrator cited with approval the reserve rights doctrine as enunciated in *United States Steel Corp. v. United Mine Workers of America, Local 9706*, (Russell, Arb.):

> Management does not get its authority to conduct its business from the collective bargaining agreement. It already has the authority and the collective bargaining agreement is the limitation on that authority. Therefore, management retains the authority or powers it did not bargain away in the collective bargaining agreement. All arbitrators agree on that relationship between the parties. Therefore, management does not look to the contract for its authority. It looks to the contract for limitation on its authority.

In *Jim Walter Resources, Inc.*, the arbitrator noted the existence of several contractual provisions that mention rotating shifts including Article VI(f) and found that none placed a limitation on the employer's authority to institute rotating shifts.

346. Cannelton Industries, Inc. v. United Mine Workers of America, Local 8843, 77-1 ARB. ¶ 8211 (1977) (Lieberman, Arb.). The arbitrator cites ARB No. 36 in support of his finding that the management right prevails over past practice.

347. Northern American Coal Corp. v. United Mine Workers of America, Local 1810, 79-1 ARB. ¶ 8050 (1978) (Feldman, Arb.).

348. Consolidation Coal Co. v. United Mine Workers of America, District 6, Local 1638, 85-1 ARB. ¶ 8162 (1985) (Duda, Arb.).

349. Article IV, Section (d)(3) reads as follows:

> (3) All Employees at mines which produce coal six (6) days per week shall be given a fair and equal opportunity to work on each of such six (6) days. Laying off individual Employees during the week for the purpose of denying them six (6) days' work is prohibited.

See Quarto Mining Co. v. United Mine Workers of America, District 6, Local 1785, 84 Lab. Arb. (BNA) 150 (1985) (Duda, Arb.) (holding that the employer's refusal to supply information to employees that would enable them to determine the employer's compliance with Article IV, Section (d)(3) violated the agreement). The only other union success in a shift scheduling case came on an arbitrability issue in Saginaw Mining Co. and United Mine Workers of America, District 6, Local 9695, 82 Lab. Arb. (BNA) 743 (1984) (Duda, Arb.).

c. Vacation

The arbitral trend of upholding management's scheduling decisions is reflected also in published vacation cases. Arbitrators denied 90% of the grievances found in published cases during the study period.[350] This success rate seems attributable to key provisions of the vacation article (Article XIII). While employee vacation scheduling rights are set forth in considerable detail in Articles XIII and XIV of the Agreement, key provisions afford management considerable discretion in resolving scheduling issues. For example, Article XIII, Section (c) gives employees a right to their preferred vacation period:

> so long as this will not interfere with efficient operations as determined by the Employer and so long as not more than 15% of the work force at a mine elects to be off on the same day.

Similarly (e)(1) gives the right to take floating vacation days on a consecutive or nonconsecutive basis:

> at such times as desired by the Employee so long as approved by the Employer at least 30 days in advance and in accordance with the principles of Section (c) of this Article.

Provisions such as these along with the employer's general authority to manage the mine under Article IA, Section (d) combine to give management broad discretion to make reasonable scheduling decisions. The published cases affirm this broad discretion.[351]

In one case where the union enjoyed a partial victory, the arbitrator held that past practice governed the scheduling of graduated

350. Four and one-half of the five published cases (90%) favored management.

351. *See* Consolidation Coal Co., No. 19 Mine, Preparation Plant v. United Mine Workers of America, Local 7690, 71 Lab. Arb. (BNA) 1068 (1978) (Van Pelt, Arb.) (holding that a contrary practice did not negate the 30 day notice requirement of Article XIII, Section (e)); Saginaw Mining Co. v. United Mine Workers of America, District 6, Local 9695, 83 Lab. Arb. (BNA) 310 (1984) (Feldman, Arb.) (upholding the employer's right to deny a requested graduated vacation day on production and efficiency grounds as reflected in its 15% rule); Eastern Associated Coal Corp., Harris Complex v. United Mine Workers of America, District 17, Local 1503, 82-2 ARB. ¶ 8340 (1982) (Ipavec, Arb.) (upholding the Employer's notice to Employees of a change in vacation scheduling practice as reasonable); Consolidation Coal Co. v. United Mine Workers of America, District 12, Local 9721, 84-2 ARB. ¶ 8373 (1984) (Feldman, Arb.) (upholding the Employer's denial of consecutive vacation days including graduated vacation on the basis of a 15% quota rule and denying the effectiveness of a contrary past practice).

vacation days in the absence of an employer demonstration that its restriction was based on maintaining efficient production at the mine.[352] The arbitrator expressly rejected the employer's attempt to rely exclusively on reserved managerial authority, pointing to the limitation in Article XIV, Section (g) (scheduling by mutual agreement).[353] He also disagreed with several other arbitrators who found no contractual restriction on management's scheduling right.[354] The noted excerpt captures the arbitrator's approach to the issue of reserved managerial authority under Article XIV, Section (g) and explains his reliance on past practice.[355]

---

352. Enoxy Coal Co., Pevler No. 21 and 23 Mines v. United Mine Workers of America, District 30, Local Union 1827, 83-2 ARB ¶ 8471 (1983) (Sergent, Arb.).

353. *Id.* at 5100.

354. *Id.*

355. In *Enoxy Coal Co.*, the arbitrator said the following:

> In the opinion of this arbitrator, those decisions cannot support a decision for the Employer herein. To do so would be to yield to the Employer a greater amount of managerial discretion in scheduling graduated vacation than the Agreement permits. Rather than remaining silent on the question of scheduling these days off, a situation which would result in the Employer having complete discretion pursuant to its reserved management rights, Article XIV, Section (g), expressly restricts this authority by providing that scheduling shall be made by mutual agreement of the employer and employee. Thus, the Agreement clearly recognizes that both parties have an interest in and certain rights regarding scheduling graduated vacation. The Employee's interest is fairly clear. He needs to schedule the vacation at a time which is most convenient to him and which will permit him to get the most benefit from the time permitted him away from work. The use he puts this time to, of course, will vary from one individual to the next. Various recreational needs, work away from employment, sporting interests, family ties and other activities commonly control this decision. The Agreement recognizes this interest, however, and requires that it be given expression in vacation scheduling unless an overriding managerial interest renders this impossible. The Employer's interest is quite different. While other concerns may be discovered, two primary interests of the Employer in scheduling graduated vacation are evident. First, the Employer must have sufficient notice of the absence to enable it to compensate for the missing employee at the mine. Secondly, the Employer must be able to limit the number of employees who are absent at any one time so it can keep the mine efficiently producing.
>
> Neither the employer nor the employee can arbitrarily withhold its agreement to schedule graduated vacation. Instead, they must agree on a time for this vacation which balances the legitimate interests of both parties which are implicitly recognized in Section (g) of Article XIV of the Agreement. Because the Agreement does not set forth a specific interest which each party may advance in scheduling graduated vacation and because it does not establish a mechanism through which those interests are to be expressed, a certain ambiguity does arise. It is specifically silent with regard to the question raised herein as to whether the graduated vacation can be taken in less than full-week segments. The Agreement recognizes that the Employer's managerial discretion is restricted in scheduling this time off, but it is not explicit in determining how the scheduling should be effected. In this situation past practice is a persuasive factor in deciding the method of scheduling which properly

d. Overtime

Like the shift and vacation scheduling categories, employers enjoy a high success rate in overtime scheduling cases winning about 57% of the published awards during the study period.[356] As in the other categories the lynchpin in this area is the reasonable use of managerial authority. For example, employers may require mandatory overtime, but they may not replace the regular workday as defined in Article IV, Section (b), with an extended day of excessive hours.[357] Employers must also accept an employee's reasonable excuse for not accepting the overtime assignment.[358] The few cases lost by management in this area have involved attempts to require overtime under unreasonable circumstances.[359]

An important provision of the Agreement is Article IV, Section (d)(7) requiring the maintenance of a current overtime roster to aid in equitably distributing overtime.[360] This provision reflects the parties' view that overtime is a valuable employment opportunity. At the same time the equitable distribution feature restricts what would otherwise be an exclusive right of management to allocate overtime.[361] The restriction is not of the most stringent variety.[362] Rather,

---

implements this provision of the Agreement.
Id. at 5100.

356. Arbitrators denied the grievance in four of the seven overtime scheduling cases published during the study period.

357. *See* Arch of West Virginia, Inc. v. United Mine Workers of America, District 17, Local 1302, 90 Lab. Arb. (BNA) 1220 (1988) (Volz, Arb.).

358. *Id.* at 1223.

359. *See* Consolidation Coal Co., Ireland Mine v. United Mine Workers of America, District 6, Local 1110, 88-2 ARB. ¶ 8584 (1988) (Stoltenberg, Arb.) (where the employer revoked the grievant's waiver of overtime and idle day work in violation of a long established practice); Consolidation Coal Co., Ireland Mine v. United Mine Workers of America, Local 1110, 93 Lab. Arb. (BNA) 836 (1989) (Morgan, Arb.) (where the employer notified the grievant of an overtime assignment one-half hour before the end of the shift).

360. Article IV, Section (d)(7) reads as follows:

> Idle day work must be equally shared in accordance with past practice and custom. An overtime roster must be kept up to date and posted at each mine for the purpose of distributing overtime on an equitable basis to the extent practicable.

361. *See* ELKOURI & ELKOURI; HOW ARBITRATION WORKS, 534-36 (4th ed. 1985).

362. *See id.* at 535 noting the following:

> Many agreements do deal with the allocation of overtime. Some leave management little or no discretion in the matter. For example, where the agreement provided that "overtime shall be distributed proportionately among all qualified employees" within a given work group, it was held that day-to-day equalization of overtime was called for.

the Agreement's term calling for distribution "on an equitable basis to the extent practicable" gives employers some latitude in accomplishing equalization. In speaking about overtime equalization provisions in general, Elkouri and Elkouri have observed the following:

> Arbitrators have recognized various considerations which may be relevant in judging whether management has administered the overtime equalization provision in a reasonable manner. Among others, these include such factors as ability to do the required work, safety and plant protection, and reasonably assured availability. Arbitrators have disagreed as to whether the cost factor is a relevant consideration. (footnotes omitted)[363]

The dominant view among arbitrators is that the union has the burden of proving that the employer improperly bypassed an employee in allocating overtime.[364] Arbitrator George W. Van Pelt's approach in *Gilbert Fuel Co., Muskingum Joint Venture and United Mine Workers of America, Local Union No. 1818*,[365] reflects this dominant trend. In an award denying the grievant's claims for overtime payments based on roster disparities, he said the following:

> Under the provisions of the Wage Agreement . . . the [grievant has] an obligation to show that he was deprived of an overtime opportunity. In other words, he must show that an employee with more overtime hours than he had was given an overtime opportunity and that he was not offered the opportunity to his detriment. The employer then has the obligation to show the impracticability aspect. An end-of-the-year cash equalization settlement based on raw figures on a roster does not comply with these requirements.[366]

---

363. *Id.* at 536.

364. *Id.* at 535.

365. 79-1 ARB ¶ 8248 (1979) (Van Pelt, Arb.).

366. *Id.* at 4033. In explaining the operation of the equalization provision Arbitrator Van Pelt said the following:

> Article IV, Section (d)(7) specifically provides that overtime be distributed on an "equitable basis" to the extent "practicable." Equitable cannot be interpreted as a "blanket condition" of equality, but must be interpreted as being equal according to conditions governing the situation. Further the term "practicable" must be used synonymous with "possible."
>
> Overtime work, for the most part, involves the necessity to extend the shift or even double men over as a result of an emergency situation. This can be caused by a major breakdown of equipment where repair of the equipment is required at the earliest possible time. Other instances would be in the event of an equipment move. In either of the foregoing instances, the necessity for overtime cannot be planned and, therefore, not scheduled in advance. The advisability of sending a man home at the completion of his shift, who is working on a breakdown, and calling in a man from another shift who might be lower in

e. Idle Day Work

Dispositions in this category reflect the same employer success rate as other scheduling cases published during the study period. Employers won almost 71% of these disputes.[367]

Under the Agreement different rules apply to the scheduling of employees depending upon whether the mine is producing coal. On coal production days all active employees are entitled to be scheduled for work, and any use of less than the full complement of employees can only be accomplished in accordance with the reduction in force provisions of Article XVII, Section (b) (Seniority). By contrast, when coal is not produced, referred to as idled days, the employer may schedule employees without regard to the reduction in force provisions as long as the requirements of Article IV, Section (d)(7) are complied with.[368] If a day is initially scheduled as idle but then used

---

overtime, would be questionable. This practice could and probably would result in a delay in getting the equipment back into operation. As a result, that practice could not only result in a loss to the Company, but to the other mine workers who could not work their full shift due to the down time of the equipment. *Id.* at 4032.

367. Eight and one-half of the 12 published awards (70.8%) involving the scheduling of idle days during the study period were won by employers.

368. *See supra* note 360 for a quotation of Article IV, Section (d)(7). In Pittsburgh & Midway Coal Mining Co., Empire Mine v. United Mine Workers of America, District 14, Local 1627, 82 Lab. Arb. (BNA) 1290, 1292 (1984) (Roberts, Arb.) the arbitrator described the distinction between production and idle days as follows:

> It is well established under the terms of the National Bituminous Coal Wage Agreement, . . . , that when the mine produces coal, all active Employees of the Company are entitled to be called out and to work. This is true whether the mine produces coal three days or six days per week. It is also well established that if the Company sends Employees home or fails to call them out for work on a production day, that amounts to a reduction in force or a decrease in manning. The Company may only accomplish such a reduction in force by implementation of and compliance with the provisions of Article XVII, Seniority, Section (b), reduction realignment, laying off in accordance with seniority and ability to perform the work on the job. Failure to work all Employees when the mine is engaged in the production of coal without complying with Article XVII, Section (b) is a violation of the Contract which will result in grievances being sustained and remedied. . . .
>
> The other side of the coin or principle . . . is that idle days stand upon a different footing than production days under the contract. An idle day occurs when coal is not being produced. Upon such an idle day, maintenance and other work may be performed and some but not all Employees may be requested to work without a contract violation being involved so long as the provisions of Article IV, Section (d) for the sharing of the idle day work are observed and adhered to. There is no limitation under the Contract as to how many idle days may occur per week. If the mine is only producing coal three days per week, other days may be treated as an idle day so long as coal is not produced. So long

to produce coal, it is deemed a production day for purposes of applying the seniority rules.[369] Similarly, interruptions in production that do not fully terminate production do not change the status of a production day.[370] An employer may not violate the seniority rules by selectively shortening the work days of employees immediately affected by production breakdowns during a production day.[371] However, an employer may change a production day to an idle day, even during the shift, as long as the reporting pay provisions of Article IX, Section (c) and the idle day work sharing provision of Article IV, Section (d)(7) are complied with.[372]

Employers may not unilaterally change practices that have been mutually recognized by the parties for equally distributing idle day work.[373] On the other hand, past practice does not require an employer to guarantee idle day work.[374] Other disputes involving idle day scheduling concern the definition of production,[375] the rights of

---

as the mine is idled and not producing coal, a reduction in force or layoff has not occurred and the Company need not comply with the provisions of Article XVII, Section (b) in order to work only some Employees. Instead, its obligation in permitting some, but not all, Employees to work is limited to doing so in accordance with the provisions of Article IV, Section (d)(7) for the sharing of the idle day work.

369. Enoxy Coal Co. and District 30, 81-30-82-304 cited in Pittsburgh & Midway Coal Mining Co., 82 Lab. Arb. (BNA) 1290, 1292 (1984) (Roberts, Arb.).

370. Armco, Inc. and District 17, KD 79-17-170, cited in Pittsburgh & Midway Coal Mining Co., 82 Lab. Arb. (BNA) 1290, 1292 (1984) (Roberts, Arb.).

371. Valley Camp Coal Co. & District 17, (Lugar 1972) cited in Pittsburgh & Midway Coal Mining Co., 82 Lab. Arb. (BNA) 1290, 1292 (1984) (Roberts, Arb.).

372. Pittsburgh & Midway Coal Mining Co., 82 Lab. Arb. (BNA) 1290, 1292 (1984) (Roberts, Arb.).

373. *See* Scotts Branch Coal Co. v. United Mine Workers of America, District 30, Local 2264, 87 Lab. Arb. (BNA) 881 (1986) (Feldman, Arb.) (where the arbitrator sustained the grievance of an employee whose employer had unilaterally changed his idle day work roster).

374. *See* Peabody Coal Co. (Bee-Veer Mine) and Local 7688, District 14, United Mine Workers of America, 76-1 ARB. ¶ 8259 (1976) (Sinicropi, Arb.) (where the arbitrator upheld the employer's right to cancel idle day work previously scheduled and later found nonexistence).

375. *See* ARB Decision No. 78-61, where Chief Umpire, Richard I. Bloch noted that the parties had distinguished between "production" and "processing" of coal for purposes of applying the idle work provision. In that case, where the employer had assigned work on already-mined coal on the basis of an idle day work plan, the arbitrator declined precisely to distinguish between "producing" and "processing" but said the following: "This was a unique and limited situation which, by any test, does not correspond to the range of activities normally associated with the standard production day. *See also* Beth-Elkhorn Corp., Mine No. 26 v. United Mine Workers of America, District No. 30, Local 1468, 83-1 ARB ¶ 8112 (1983) (Wren, Arb.) (where the arbitrator held that processing (as opposed to producing) coal could not be done under idle day rules on a regular workday and said

production employees on idle days,[376] and individual employee assignments.[377] Where a past practice provides a benefit to employees in the scheduling of idle days, it will be deemed binding on the employer and immune from unilateral change.[378]

3. Management Rights and Union Security

Though, as indicated in earlier discussion, the management rights issue constitutes a dimension of many disputes, the present category consists of cases involving pure exercises of some traditional management right. While perhaps limited by specific provisions of the agreement, management's conduct in these cases rests solely upon the right contained in Article IA, Section (d) of the Agreement. In all except one case, the issues involved the classification and assignment of employees.[379] Management won about 56% of the management rights cases in this category, published during the study period.[380] Management was deemed to have the right to reasonably reclassify,[381] correct a job classification,[382] require certification prior

---

that such processing could take place where idle workdays fell on Saturdays and, possibly, holidays other than Christmas eve or Christmas day). *Cf.* Wheelright Mine Co. v. United Mine Workers of America, District 30, Local 5899, 91 Lab. Arb. (BNA) 1281 (1988) (LeRoy, Arb.) (where the arbitrator found that the simultaneous working of load out and processing crews most of the time did not establish a practice of requiring that process crews work when load out crews are working).

376. *See* Consolidation Coal Co., Amonate Mine v. United Mine Workers, District 29, Local 2322, 84-1 ARB ¶ 8285 (1984) (Probst, Arb.) (where the arbitrator permitted the production of coal as incidental to the nonproduction idle day work).

377. *See, e.g.*, Central Ohio Coal Co. v. United Mine Workers of America District 6, Local 1604, 87-2 ARB ¶ 8488 (1987) (Lieberman, Arb.) (where the arbitrator held that past practice did not prevent the company from changing the grievant's idle day reporting site) and Peabody Coal Co. v. United Mine Workers of America, District 23, Local 3000, 92 Lab. Arb. (BNA) 705 (1985) (Feldman, Arb.) (where the arbitrator held that the grievant had no right of reassignment to idle day work after a proper assignment in the grievant's absence).

378. *See* Consolidation Coal Co. v. United Mine Workers of America, District 6, Local 1785, 90 Lab. Arb. (BNA) 952 (1988) (Stoltenberg, Arb.) (where the arbitrator reversed the employer's change in the method of listing idle day work, holding that the past practice of alphabetical listing was for the benefit of employees, had been in existence for at least two years and had lessened time and risk associated with trying to find an employee's name on the new non-alphabetical job list).

379. The exception is Maple Meadow Mining Co., Cannelton Industries, Inc. and United Mine Workers of America, District 29, Local 1961, 83-2 ARB ¶ 8402 (1983) (Williams, Arb.) (dealing with an employer's right to demand the release of medical information as a condition of recall).

380. Five of the nine cases (55.6%) published during this period reported awards favoring management.

381. Jim Walter Resources Inc. v. United Mine Workers of America, District 20, Local 1928, 84 Lab. Arb. (BNA) 805 (1985) (Feldman, Arb.).

382. Blackwood Fuel Co., Inc., Pardee Mine v. United Mine Workers of America, District 28, Local 6354, 78-1 ARB ¶ 8202 (1978) (Ipavec, Arb.).

to the completion of training,[383] eliminate a job,[384] and temporarily assign employees out of classification.[385] Unreasonable exercises of management power were not condoned.[386] Of course, management authority reserved under Article IA, Section (d) could not insulate clear transgressions against specific contractual rights.[387]

The union won all three union security cases published during the study.[388] The recurring issue in this category of cases is whether Article XVII, Section (l) entitling employees to leaves of absence for union activity encompasses union activity of a political as well as organizational nature.[389] Like federal courts, arbitrators generally have distinguished between organizational/collective bargaining activity and political activity, for purposes of determining the extent

383. Valley Camp Coal Co. v. United Mine Workers, Local 6271, 77- 1 ARB ¶ 8033 (1977) (Perry, Arb.).

384. Arch on the Green, Inc. v. Local 1605, District 23, United Mine Workers of America, 89 Lab. Arb. (BNA) 892 (1987) (Seidman, Arb.).

385. Jim Walter Resources, Inc., No. 3, Brookwood, Alabama v. United Mine Workers of America, District 20, Local 1928, 79-1 ARB ¶ 8161 (1979) (Clarke, Arb.).

386. *See, e.g.*, Maple Meadow Mining Co., Cannelton Industries, Inc. v. United Mine Workers of America, District 29, Local 1961, 83-2 ARB ¶ 8402 (1983) (Williams, Arb.) (where the arbitrator struck down the employer's attempt to secure medical information not reasonably related to employment as a condition of recall); Youghiogheny and Ohio Coal Co. v. United Mine Workers of America, Local 1601, 77-1 ARB ¶ 8154 (1977) (Perry, Arb.) (where the employer improperly assigned a helper trainee to a job requiring more training); Saginaw Mining Co. v. United Mine Workers of America, District 6, Local 9695, 83 Lab. Arb. (BNA) 741 (1984) (Duda, Arb.) (where the arbitrator sustained the grievance based on the employer's breach of confidentiality).

387. *See, e.g.*, Kentucky Carbon Corp. v. United Mine Workers of America, District 30, Local 1416, 85-2 ARB ¶ 8617 (1985) (Feldman, Arb.) (where the arbitrator struck down the employer's assignment of an employee out of a classification to fill a vacancy in violation of Article XVII, Section (i).

388. As noted in the Frequency Table, Appendix I, the Union won 4 of 4 union security cases.

389. Article XVII, Section (l), Leave of Absence, reads:

> Employees who have an official request for leave of absence shall be granted leave to participate in Union activities and to serve as district or international officers or representatives and shall retain their seniority and accrue seniority while they are on such leave. Employees who have an official request for leave of absence shall be granted leave to accept a temporary Union assignment, not to exceed four (4) consecutive months, and upon the expiration of such leave shall be entitled to return to their former jobs and shifts. Except in cases of District or International Conventions or District Conferences relating to national contract negotiations, no more than two (2) Employees may accept such temporary Union assignments from the same mine at the same time. Permanent Union appointees and those Employees who are elected to a district or international office shall be entitled to return to a job, provided that Employees with greater seniority at the mine are not on layoff status, and may bid on such vacancies as are posted. Where, by prior practice or custom, a permanent Union officer or appointee is entitled to return to his job, that practice shall be continued. This provision is retroactive to April 1, 1964.

of the employer's obligation under union business leave provisions.[390] However, the coal industry has featured a debate among arbitrators about whether Article XVII, Section (l) limits the scope of union activity to organizational or collective bargaining activity at the exclusion of political activity.[391] Whether employees are entitled to union business leave to attend meetings of the Coal Miner's Political Action Committee (COMPAC) presents the issue starkly. The prevailing view is that "union activity" in Article XVII, Section (l) is to be liberally construed.[392] While one arbitrator held that "political activities were [not] contemplated by the negotiators when they incorporated Article XVII, Section (l),"[393] the dominant view was expressed by Arbitrator Feldman in *Consolidation Coal Co.* as follows:

> Union activities mean union activities. They do not mean some, those that are liked, those that involve non-political activity, but rather it means *all* union activity. To hold otherwise would be to change the terms of the contract and, quite frankly, the general rule by other arbitrators [giving] meaning, without limitation, to all union activity.[394]

4. Discrimination

Article XXV prohibits discrimination in the terms or availability of employment.[395] Like statutory and other contractual anti-discrim-

---

390. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 756-57 (4th ed. 1985). *See also* Communication Workers v. Beck, 487 U.S. 735 (1988).

391. For example, Arbitrator Stone in denying a grievance based on the employer's refusal of leave to attend Coal Miner's Political Action Committee (COMPAC) meetings said the following:

> My interpretation of this section is in question. Is it there intended to provide for leaves in order to take care of the business of the union in its capacity of bargaining agent and to represent the national union in traditional and characteristic ways, such as attendance at conventions, etc.?

Case No. 84-12 85-88 (April 5, 1985). *Cf.* Consolidation Coal Co. v. United Mine Workers of America, District 12, Local 1825, 84 Lab. Arb. (BNA) 1042 (1985) (Feldman, Arb.).

392. *See* Consolidation Coal Co., Mid-Continent Region, Burning Star Mine No. 5 v. United Mine Workers of America, District 12, Local 2216, 86-2 ARB ¶ 8515 (1985) (Hoh, Arb.) (where the arbitrator held that attending a union organizing committee meeting fell within the ambit of "union activities"); Consolidation Coal Co. v. United Mine Workers of America, District 12, Local 1826, 83 Lab. Arb. (BNA) 992 (1984) (Feldman, Arb.) (where the Arbitrator sustained the grievance against an Employer's refusal to permit local union president to attend union discussions of selective strikes) and Sharples Coal Co. v. United Mine Workers of America, District 17, Local 2935, 89-1 ARB ¶ 8048 (1988) (Volz, Arb.) (holding that pole watching at the direction of COMPAC is union activity under Article XVII, Section (l)).

393. *See* Arbitrator Stone's views as excerpted in Consolidation Coal Co. v. United Mine Workers of America, District 12, Local 1825.

394. *Id.* at 1044.

395. This provision reads as follows:

ination provisions, Article XXV calls for a fact-based inquiry into the reason for the employer's conduct.[396] Typically, the union claims that the employer's conduct is motivated by impermissible considerations, often grievance filing.[397] And there are other cases where discrimination is founded upon the "unequal or unfair application of policy to an individual or group."[398] In either type of case the union has the burden of proving, normally by a preponderance of the evidence, arbitrary, capricious or discriminatory conduct or the unequal or unfair application of policy.[399] There is also arbitral opinion that the list of prohibited reasons specified in Article XXV is nonexhaustive.[400] For those arbitrators employers and unions are prohibited from discriminating for any reasons that are deemed arbitrary or capricious.[401]

5. Working Conditions

This category encompasses cases involving the employer's obligation to provide hot water in bathhouses,[402] to provide a reasonably

---

Article XXV DISCRIMINATION PROHIBITED

Neither the Employee nor the Union shall discriminate against any Employee or with regard to the terms or availability of classified employment on the basis of race, creed, national origin, sex, age, political activity, whether intra-Union or otherwise. In addition, the Employer and Union agree that they will adhere to applicable provisions of the Vietnam Era Readjustment Assistance Act of 1974 and the Rehabilitation Act of 1973.

396. *See, e.g.* NLRB v. Transportation Mgt. Corp., 462 U.S. 393 (1983).

397. *See, e.g.*, Drummond Co., Inc., Marylee Mine No. 1 v. United Mine Workers of America, District 20, Local 1881, 87 Lab. Arb. (BNA) 167 (1986) (Kilroy, Arb.); Valley Camp Coal Co., No. 1 Mine v. United Mine Workers of America, District 6, Division No. 4, Local 1417, 67 Lab. Arb. (BNA) 543 (1976) (Ipavec, Arb.) and Alabama By-Products Corp. and United Mine Workers of America, District 20, Local 7813, 67 Lab. Arb. (BNA) 587 (1976) (Grooms, Arb.) (refusal of employee to sign a receipt for using company tools).

398. North American Coal Co., Powhatan No. 6 Mine, Alledonia, Ohio v. United Mine Workers of America, District 6, Local 1810, 81-1 ARB ¶ 8265, 4181 (Staudter, Arb. 1980) (where the arbitrator sustained the grievance against the nonuniform assignment of supervisors to employees working casual overtime) and Princess Susan Coal Co. v. United Mine Workers of America, District 17, Local 340, 72 Lab. Arb. (BNA) 257 (1979) (Lieberman, Arb.) (where the arbitrator found that payment above scale of certain employees discriminatory against employees paid at scale).

399. *See, e.g.*, Drummond Coal Co. Inc., 87 Lab. Arb. (BNA) 167 (1986) (Kilroy, Arb.) (where the union failed to produce sufficient evidence of impermissible motivation).

400. *See* North American Coal Co., Powhatan No. 6 Mine, Alledonia, Ohio v. United Mine Workers of America, District 6, Local 1810, 81-1 ARB ¶ 8265, 4181 (Staudter, Arb.).

401. *Id.*

402. *See* Monterey Coal Co., No. 1 Mine v. United Mine Workers of America, District 12,

comfortable eating place,[403] and other conditions relating to the quality of the work environment.[404] An intriguing issue relating to employee working conditions is the extent of an employer's liability for injuries to employee property occurring on the employer's premises. This question flows from contractual provisions such as Article XXII, sections (b) and (c) imposing a duty on the employer to maintain certain conditions in the workplace.[405]

The two published cases dealing with employer liability for employee property damage growing out of contractual breaches apply slightly different theories. In *Consolidation Coal Co., Georgetown No. 12 Mine and United Mineworkers of America, District No. 6, Division No. 3, Local 7690*,[406] the arbitrator sustained the grievance under Article XXII, Section (c) finding that the grievants were forced to park on an access road or county road, because the employer

---

Local 1613, 89 Lab. Arb. (BNA) 989 (1987) (Fullmer, Arb.) (where the arbitrator found that the employer violated the agreement by failing to provide hot water, noting the dispute about whether the water was warm or cold). *Cf.* Valley Camp Coal Co., No. 1 Mine v. United Mine Workers of America, District No. 6, Division 4, Local 1417, 66 Lab. Arb. (BNA) 930 (1976) (Ipavec, Arb.) (where the arbitrator held that he was without authority to award the grievant additional compensation for the employer's failure to consistently provide hot water for showers.).

403. *See* Hobet Mining, Inc., Mine No. 7 and United Mine Workers of America, Local 5817, 85 Lab. Arb. (BNA) 1077 (1985) (Duff, Arb.) (finding no excessive motion in the cab of a shovel so as to make it an unreasonably uncomfortable eating place.) and Drummond Co., Arkadelphia 1570 Mine, Arkadelphia, Alabama v. United Mine Workers of America, District 20, Local 1553, 80-1 ARB ¶ 8077 (1979) (Clark, Arb.) (finding that operator positions of bulldozers, scrapers and other mobile equipment were comfortable eating places within the meaning of Article XXI, Section c, of the agreement).

404. *See, e.g.*, Amherst Coal Co. 3-A Surface Mine v. United Mine Workers of America, District 17, Local 1302, 87-2 ARB ¶ 8467 (1986) (Stoltenberg, Arb.) (where the arbitrator upheld the employer's right to relocate a parking area a greater distance from the bathhouse, despite a contrary past practice that would conflict with the agreement) and Ohio Valley Coal Co. v. United Mineworkers of America, District 6, Local 1810, 90-1 ARB ¶ 8126 (1989) (Lipson, Arb.) (where the arbitrator sustained agreements protesting the employer's discontinuation of the practice of providing drinking water in half-pint containers, where the practice did not conflict with the Agreement).

405. Article XXII reads in part as follows:

Section (b) Access Roads.

The Employer shall maintain mine access roads in reasonably good condition to permit safe passage by Employees and their vehicles. An access road is a road providing access from a public road to the location where Employees report to work. This provision imposes no responsibility on the Employer for maintenance of any public road.

Section (c) Parking Facilities

The Employer shall provide and maintain an adequate parking facility for Employees' vehicles. Where such facility is permanently located, it shall be adequately lighted.

406. 67 Lab. Arb. (BNA) 358 (1976) (Ipavec, Arb.).

failed to provide adequate parking spaces.[407] The arbitrator rejected the employer's suggestion that it could not be held liable for the employees' property damage without a showing that its breach caused the damage. The arbitrator dismissed this suggestion as being premised upon a tort theory rather than a contractual theory of damages that would make the employer "liable for all damages which naturally flow from the breach."[408]

In *Pittsburg & Midway Coal Mining Co., McKinley Mine and United Mineworkers of America, Local 1332, District 15*,[409] the arbitrator rejected arguments asserting the employer's liability for property damage associated with the condition of an access road under Article XXII, Section (b).[410] In that case the arbitrator applied a negligence standard, holding that the employer could not be liable as long as it adhered to a standard of reasonable care in maintaining the good condition of access roads.[411] Citing an ARB decision in a similar case, the arbitrator added that the union's burden was to show the employer's failure of reasonable care as the cause of employee property damage in light of the employer's operational needs.[412] This standard would seem to give the employer more protection than the conventional negligence standard or the arbitrator's contractual theory in *Consolidation Coal Co.* Both cases, of course, turn on the arbitrator's factual conclusions about the employer's maintenance of certain employment conditions.

6. Successorship

Like other job security provisions, successorship clauses reflect employee concerns about dwindling employment opportunities.[413] Specifically, successorship provisions address the possibility of lost

407. *Id.* at 360-61.
408. *Id.* at 361.
409. 80 Lab. Arb. (BNA) 792 (1983) (Hogler, Arb.).
410. *Id.* at 796-97.
411. *Id.*
412. *Id.* at 796.
413. *See* Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rationale Approach* 57 MINN. L. REV. 1051 (1973). *See also* Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27 (1987).

employment opportunities created by the transfer of ownership.[414]

In the 1974, 1978 and 1981 Agreements the parties address this employee concern in Articles I and IA, Section (h).[415] Article I imposed an assumption obligation, requiring the employer to secure a successor's promise to assume the collective bargaining agreement. Article IA, Section (h) introduced in the 1978 Agreement, protected employees from the employment effects of leasing, subleasing, and licensing arrangements. Starting with the 1984 Agreement Article I also required employers to notify the union at the conclusion of any transfer of mining operations. That Agreement also expanded employment rights in the context of leasing, subleasing, and licensing arrangements under Article IA, Section (h). In the 1988 Agreement the expanded employment rights of Article IA, Section (h) became part of an employment security provision known as the JOBS Program contained in Article II, Section (B).[416] These contractual pro-

---

414. *Id.*

415. Article I is the Enabling Clause and reads in part as follows:

> This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operation as covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligation under this Agreement. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of his obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

In their choice of this contractual mechanism the parties were undoubtedly influenced by Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249 (1974), where the Court refused to find a bargaining obligation based on such a clause but suggested that the union could sue the predecessor promisor under the clause. Later cases show that such actions can also run against successors depending upon the nature of the obligation. *See, e.g.*, UMWA v. Eastover Mining Co., 603 F. Supp. 1038 (W.D. Va. 1985).

Article IA, Section (h) is titled Leasing, Subleasing and Licensing Out of Coal Lands and reads as follows:

> The Employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof.
>
> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the licensing out does not cause or result in the layoff of Employees of the Employer.

416. The purpose of the JOBS Program and employment rights of employees when coal lands are leased, subleased or licensed are partially set forth in the following excerpt:

visions recognize the complexity of ownership arrangements in the mining industry and attempt to protect employees in a variety of transactions.[417]

During the study period employers prevailed in all the published successorship cases.[418] An overwhelming majority of the published cases dealt with the question of whether a subsequent employer is a successor for purposes of triggering the protection of Article I of the Agreement.[419] These cases typically involve new mining operators who take over defunct mines without entering into any transaction with the prior owner that could be characterized as a sale, conveyance or transfer within the meaning of Article I of the agreement.

The paradigm case was *Nephi Coal Properties, Inc., Gut Fork Mine, and United Mine Workers of America, District No. 17, Local Union 2935*,[420] decided by the ARB. In that case Zapata/Dal-Tex held the mining rights to an underground mine called Gut Fork

---

Article II, Job Opportunity and Benefit Security (Jobs)

The parties hereto recognize and agree that the production of bituminous coal involves, by its very nature, the depletion of resources at work locations. The parties agree further that varied mining arrangements and technological advances can adversely impact on job security and that their mutual goals of mining coal safely and efficiently can best be achieved by the use of experienced miners who are knowledgeable of the Employer's standards of operation.

As a result of the special nature of the bituminous coal mining industry and the parties' desire to develop a relationship in which the Employees as well as the Employers gain from a growth in productivity, the parties agree to establish the Job Opportunity and Benefit Security (JOBS) Program. The JOBS Program is designed to achieve, to the fullest extent allowed by law, job security for classified employees through extended panel rights and new training opportunities. Nothing in the JOBS Program shall be construed to diminish any rights of the Employees or the Union established in any other provision of this Agreement including, but not limited to, the successorship clause, Article IA(h) and Article XVII.

417. *See generally* Gies & Smith, *Labor Law Successorship Under the National Bituminous Coal Wage Agreement and the Union's Campaign for Job Security*, 90 W. VA. L. REV. 921 (1988).

418. Employers won six of the six published cases.

419. Dealing with the definitional issue were Little Rose Coal Co. v. United Mine Workers of America, District 30, Local 6095, 85 Lab. Arb. (BNA) 1103 (1985) (Feldman, Arb.); Seam Coal, Ltd. v. and United Mine Workers of America, District 17, Local 6112, 86-1 ARB ¶ 8041 (1985) (Duff, Arb.); Russell Coal Inc. v. United Mine Workers of America, Local 7930, 87-1 ARB ¶ 8230 (1987) (Nicholas Arb.); and Amex Coal Co., Wright Mine v. United Mine Workers of America, District 11, Local 1015, 91 Lab. Arb. (BNA) 254 (1988) (Kilroy, Arb.).

420. ARB No. 78-17 (1979).

Mine. It leased the mine to the Jasper Mining Company who hired employees and operated the mine for a period of time before ceasing operations and laying off employees. One year later, the leaseholder subleased the mine to Nephi Coal Properties, a separate entity from Zapata/Dal-Tex or Jasper. Nephi had no dealings with Jasper before it assumed the operation of the mine. Nephi purchased all new equipment, retained no former Jasper managerial or supervisory employees, and offered to hire former Jasper employees only as new employees.[421] The grievants were former Jasper employees who refused to apply for Nephi openings as new employees and insisted that their panel and seniority rights as Jasper employees be recognized by Nephi.[422] The ARB held that Nephi was not a successor, since it lacked the necessary linkage with Jasper.[423] The ARB's reasoning is summarized in the following statement:

> Accordingly, the conclusion reached here is that where there is no sale, conveyance or other transfer assignment of an operation between a former operator of a mine site or facility and a subsequent operator of a mine site or facility, and no other financial or organizational linkage between them, there is no basis for finding, under the National Agreement, that the subsequent operator is the "successor or assignee" of the former operator for purposes of requiring the subsequent operator to hire the employees of the former operator on the basis of their rights gained under the National Agreement covered with the former employer.[424]

The interesting note in the *Nephi Coal Properties, Inc.*, decision is that the grievants lost their panel rights, even though Nephi became a signatory to the Agreement. The ARB pointed out that the Agreement was not a contract for hire and only secured the rights of employees with their own employer.[425] Since Jasper and not Nephi was the employer to whom the grievant's seniority and panel rights attached, those contractual rights were ineffective against Nephi.[426] Arbitrators have been true to the ARB's linkage analysis and denied

---

421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.* at 14-15. The ARB also rejected the Union's argument that the linkage of both Jasper and Nephi to Zapata/Dal-Tex was a sufficient basis for finding successorship. The ARB was unwilling to find such a connection, where employees had never worked for Zapata/Dal-Tex and no relationship could be shown between Zapata/Dal-Tex and Jasper and Nephi.

grievances where the union has failed to meet its burden of proving the necessary linkage.[427]

Other issues involve the extent of a successor's obligation. In *United States Steel Mining Co. and United Mine Workers of America, Local 1559, District 29*,[428] the arbitrator held that satellite panel rights were individual obligations that were not transferred with mining operations by the predecessor to the successor.[429] In doing so the arbitrator affirmed the successor's view that it was only bound to recall laid-off employees to the newly purchased mine and not to its other operations.[430] And in *Enoxy Coal Co. and United Mine Workers of America, District 30, Local 1827*,[431] the arbitrator held that the obligation under Article IA, Section (h)(2) of the 1984 Agreement to hire the predecessor's laid off employees when licensing the mining operation, applies to the time of transfer.[432] It does not require the successor to offer such jobs to employees who were retained by the predecessor at the time of the transfer.[433]

7. Procedural Issues

In many cases involving the foregoing substantive issues, procedural issues, particularly those relating to arbitrability, were raised and decided by arbitrators.[434] The reluctance of arbitrators to forfeit

427. *See, e.g.*, Arbitrator Duff's analysis in Seam Coal, Ltd., 86-1 ARB ¶ 8041 (1985) (Duff, Arb.).

428. 86-2 ARB ¶ 8323 (1985) (Heekin, Arb.).

429. *Id.* at 4378-79.

430. *Id.* In distinguishing between general obligations under the Agreement and individual rights under the employment relationship the arbitrator's decision is in the spirit of ARB 78-17.

431. 87-1 ARB ¶ 8034 (1986) (Feldman, Arb.).

432. *Id.* at 3134-35.

433. It is not clear from the award whether subsequently laid off predecessor employees have a right to jobs at the successor as they open up, *i.e.*, deprived only of the right to displace junior successor employees.

434. *See, e.g.*, Consolidated Coal Co., Central Division, Rose Valley Mine (Hopedale, Harrison, Ohio) and United Mine Workers of America, District 6, Local 1557, 64 Lab. Arb. 135 (1975) (Stokes, Arb.); Consolidated Coal Co., Shoemaker Mine and United Mine Workers of America, District 6, Division 4, Local 1473, (1978) (Ipavec, Arb.); Saginaw Mining Co. and United Mine Workers of America, District 6, Local 9695, 82 Lab. Arb. 743 (1984) (Duda, Arb.); Bethlehem Mine Corp., Mine No. 33, and United Mine Workers of America, District 2, Local 1368, 84 Lab. Arb. 485 (1985) (Hewett, Arb.); Peabody Coal Co. and United Mine Workers, District 23, Locals 9800 & 1894, 77-2 ARB ¶ 8415, (1977) (Witney, Arb.); United Mine Workers, District 29, Local 8784 and H&F Mining

substantive rights because of procedural irregularities is well known in the field. Thus, in most cases, arbitrators construed the circumstances of grievances to find compliance with procedural requirements.[435] However, in a few cases procedural problems prove to be dispositive, while the merits of other cases involved procedural grievances.[436]

Perhaps the most clear-cut basis for holding a grievance inarbitrable is *res judicata*. In cases where a prior award involves "the same substantive grievance, the same fact pattern (not necessarily the same occurrence), and the same contractual provisions, in a dispute between the same parties at the same operation" the earlier award is dispositive.[437] The binding effect of such awards carries over from agreement to agreement, where the language interpreted by the award is retained.[438] The ARB announced the following exceptions to the *res judicata* principle:

> Where the Arbitrator is clearly and convincingly persuaded by the evidence and arguments of the parties before him that a prior award is so plainly and palpably erroneous that it should not be applied, he may refuse to apply the principle of arbitral *res judicata*. However, unless clearly and convincingly persuaded that:
>
> (a) The previous award was clearly an incidence of bad judgment;
>
> or

Inc., 77-2 ARB ¶ 8573, (1977) (Rimer, Arb.); Southern Ohio Coal Co. (Meigs Mine No. 1) and United Mine Workers, Local 1890, 7702 ARB ¶ 8471, (1977) (Perry, Arb.); McWane Coal Co., Inc. and United Mine Workers, Local No. 6969, 84-1 ARB ¶ 8151 (1984) (Nicholas, Arb.); Seam Coal, Ltd. and United Mine Workers, District 17, Local No. 6112, 86-1 ARB ¶ 8041, (1985) (Duff, Arb.); Amherst Coal Co. and United Mine Workers, District 17, Local 1302, 86-2 ARB ¶ 8368 (1986) (Hewitt, Arb.); Guayana Resources and United Mine Workers of America, District 17, Local Union 6512, 90 Lab. Arb. 855 (1987) (Feldman, Arb.).

435. *See e.g.*, McWane Coal Co., Inc. and United Mine Workers, Local No. 6969, 84-1 ARB ¶ 8151 (1984) (Nicholas, Arb.) (where the arbitrator found a continuing grievance, not disqualified by the limitations provisions) and United Mine Workers, District 29, Local 8784 and H&F Mining, Inc., 77-2 ARB ¶ 8573 (1977) (Rimer, Arb.) (where the arbitrator denied the untimeliness claim based on the confusion produced by the circumstances of the grievance).

436. *See e.g.*, Island Creek Coal Co., Veil Mine, and United Mine Workers of America, District 6, Division 1, Local 1573, 67 Lab. Arb. 211 (1976) (Dworkin, Arb.) and Bethlehem Mines Corp. and United Mine Workers, District 2, Local Union 7925, 84-2 ARB ¶ 8436 (1984) (Feldman, Arb.).

437. The North American Coal Corp. Quarto No. 7 Mine v. United Mine Workers of American, Local 1941, District 6, ARB 78-24 (1980).

438. *Id.* at 20-22.

(b) The decision was made without benefit of some important and relevant facts; or

(c) The decision was an obvious and substantial error of fact or law, or a Decision of the Board has intervened with which the prior award conflicts; or

(d) A full and fair hearing was not afforded in the prior case;

The Arbitrator is bound to apply the prior award even though he would not have decided the prior case in that fashion.[439]

Reflecting the ARB's clear policy preference for the *res judicata* effect, the ARB has imposed the burden of proving the avoidance of *res judicata* on the moving party and established the higher standard of clear and convincing evidence.[440] The prominence of *res judicata* in arbitral decision making under the Agreement reflects the parties preference for finality, predictability and stability in grievance dispute resolution. The concerns underlying the principle of *res judicata* are especially important in the coal mining industry, because of the historical tendency to rearbitrate settled issues.[441] Thus, *res judicata* was a recurring basis for denying grievances as inarbitral in decisions published during the study period.[442] Clear violations of contractual timetables also led to grievance dismissals for lack of arbitrability.[443]

Other procedural issues range from whether an employee's termination is covered by the newly signed Agreement to whether one party can record an arbitral hearing without the consent of the other.[444] Several of the procedural cases have involved the effect

439. *Id.* at 2-3.

440. *Id.* at 3, 20.

441. *Id.* at 14-17. *See supra* notes 12-17 and accompanying text and Article XXVII of the Agreement. The latter observation belongs to Rolf Valtin, who chaired the ARB from 1975 to 1978.

442. *See, e.g.*, Consolidation Coal Co., Shoemaker Mine v. United Mine Workers of America, District 6, Division 4, Local 1473, 71 Lab. Arb. (BNA) 257 (1978) (Ipavec, Arb.); Hobet Mining, Inc. v. United Mine Workers of America, District 17, United Mine Workers of America, 88-2 ARB ¶ 8383 (1988) (Seidman, Arb.).

443. *See, e.g.*, Island Creek Coal Co., Vail Mine v. United Mine Workers of America, District 6, Division 1, Local 1573, 67 Lab. Arb. (BNA) 211 (1976) (Dworkin, Arb.) and Bethlehem Mines Corp. v. United Mines Workers, District 2, Local 7925, 84-2 ARB ¶ 8436 (1984) (Feldman, Arb.).

444. In Republic Steel Corp., Kitt Energy Corp. Division v. United Mine Workers of America, District 30, Local 8045, 77 Lab. Arb. (BNA) 924 (1981), (Feldman, Arb.) the Arbitrator relied on Chief Umpire Paul L. Selby's memorandum to district arbitrators, dated May 16, 1979, to find that

(non-*res judicata*) of an earlier arbitration award. In *Carbon Field Co. and United Mine Workers of America, District No. 17, Local 2102*,[445] the arbitrator by order of the ARB reconsidered an award sustaining a discharge.[446] The arbitrator had sustained the discharge, based in part on an earlier suspension of the grievant later reversed in a separate arbitration.[447] The *Carbon Field Co.* arbitrator had erroneously concluded that the grievant failed to grieve the earlier suspension. Upon considering whether this error would have changed his award in the discharge case, the arbitrator held in the negative.[448] He also held that it would be inappropriate to consider the arbitrator's award reversing the suspension as new evidence, since it would "promote instability in the handling of arbitrations involving disciplinary matters."[449] The arbitrator noted the dilemma sometimes created by the right to immediate arbitration in discharge cases, which the grievant had exercised and the progressive discipline procedure characterized by increasingly severe forms of discipline.[450] Where the right to immediate arbitration is exercised, it may not be anomalous to have the discharge arbitrated before an earlier suspension is ultimately resolved.[451] Where the union protests such a suspension, it behooves the union to present evidence in the discharge arbitration regarding the validity of the suspension. That, the arbitrator noted, was not done in the case.[452]

While it would be procedurally improper for an arbitrator to correct the shortcomings of earlier awards, arbitrators have shown a willingness to order the parties to seek clarification from the orig-

---

an employer could not unilaterally transcribe the arbitration hearing, such recording being an obligation of the arbitrator in the absence of the consent of the parties and the arbitrator. And in Midway Coals, Inc. and UMWA, District 17, Local 2935, 89 Lab. Arb. (BNA) 340 (1987), (Murphy, Arb.) the arbitrator held that the agreement's just cause provisions did not cover the grievant, since he was not employed at the time the employer entered into the agreement.

445. 70 Lab. Arb. (BNA) 1205 (1978) (Wren, Arb.).

446. *Id.* at 1205-06.

447. *Id.*

448. *Id.*

449. *Id.* at 1207.

450. *Id.* at 1206.

451. *Id.*

452. *Id.* at 1207.

inal arbitrator.[453] In *Peabody Coal Co., Universal Mine and United Mine Workers of America, District 11, Local 1658*,[454] the arbitrator in an earlier award had omitted any mention of the grievants in the remedy.[455] The arbitrator held that the grievants' remedial entitlement is an appropriate matter for clarification or reconsideration by the original arbitrator and ordered the company to join the union in requesting clarification or completion of the earlier arbitrator's decision.[456] Similarly, in *Quarto Mining Co. and United Mine Workers, District 6, Local Union 1785*,[457] the arbitrator refused to resolve a dispute about the implementation of an earlier award by clarifying that award.[458] Instead, he ordered the parties to write a joint letter to the previous arbitrator requesting clarification.[459] The arbitrator noted that a second arbitrator could not act as an appeals board and that relitigation of the same case was inappropriate unless the parties agreed that the first award was nugatory.[460]

Two of the procedural cases raised issues concerning the operation of the grievance procedure. For example, in *Peabody Eastern Coal Co. and United Mine Workers of America, District 17, Local 9177*,[461] the union filed, withdrew and refiled a grievance regarding the posting of vacancies after the employer's cleaning plant came into existence in March of 1986.[462] The initial filing had been "withdrawn, non-precedent."[463] The union argued that this withdrawal entitled it to refile the grievance, while the employer urged that the refiling right existed only if an earlier settlement uses the term "with-

453. Note that absent the appellate structure it might be impossible to secure such clarification, since the doctrine of *functus officio* would prevent the original arbitrator from correcting or clarifying the substance of an award *sua sponte* or at the unilateral urging of a party. *See* Expedient Services, Inc., 68 Lab. Arb. (BNA) 1082, 1083-84 (1977) (Dworkin, Arb.).

454. 90 Lab. Arb. (BNA) 201 (1987) (Volz, Arb.).

455. *Id.* at 201.

456. *Id.* at 202-03.

457. 85-1 ARB ¶ 8117 (1984) (Feldman, Arb.).

458. *Id.* at 3478.

459. *Id.*

460. *Id.*

461. 89 Lab. Arb. (BNA) 1090 (1987) (Feldman, Arb.).

462. *Id.* at 1090-91.

463. *Id.* at 1090.

out prejudice."[464] The arbitrator denied the grievance agreeing that "without prejudice" permitted a refiling of the grievance, while "withdrawn, non- precedent," did not permit refiling but meant that the settlement could not be used as a defense in a later grievance involving similar but not the same facts."[465] And in *Consolidation Coal Co., Powatan No. 4 Mine and United Mine Workers of America, District 6, Local 1785*,[466] the arbitrator held that the employer had not violated the grievance procedure by using its supervisor of industrial employee relations as a resource person at steps 2 and 3 of the grievance procedure.[467] In this role the industrial relations supervisor was not a representative within the meaning of Article XXIII, Section (c)(3).[468]

Finally, several cases raised compliance issues. Article XXIII, Section (h) provides that "[s]ettlements reached at any step of the grievance procedure shall be final and binding on both parties and shall not be subject to further proceedings under this Article except by mutual agreement." Arbitrators have interpreted this provision to impose a burden on the party seeking to avoid a settlement to prove by clear and convincing evidence that compliance should be excused.[469] Compliance may be excused where one party seeks to apply the settlement to a dissimilar situation, where the settlement was "induced by fraud, gross misrepresentation, or mutual mistake of fact,"[470] or "where the purpose for the settlement agreement has substantially changed."[471]

---

464. *Id.* at 1090-91.

465. *Id.* at 1091.

466. 91 Lab. Arb. (BNA) 1011 (1988) (Stoltenberg, Arb.).

467. *Id.*

468. Article XXIII, Section (c), entitled GRIEVANCE PROCEDURE reads as follows in part:

(3) Within seven working days of the time the grievance is referred to them, the district representative and the representative of the Employer shall meet and review the facts and pertinent contract provisions in an effort to reach agreement. Members of the Mine Committee shall have the right to be present. No verbatim transcript of the testimony shall be taken. Neither the district representative nor the Employer representative shall be persons who participated in steps 1 or 2 of this procedure.

469. *See* Cannelton Industries, Inc. v. United Mine Workers of America, District 17, Local 8843, 91 Lab. Arb. (BNA) 744 (1988) (Volz, Arb.).

470. *Id.* at 747.

471. *Id.* at 748.

III. CONCLUSION

More coal cases arising under the National Bituminous Coal Wage Agreement were published during the fifteen-year study period than awards under any other private sector collective bargaining agreement.[472] This fact attests to the continuing intensity of arbitral activity under the Agreement. While, perhaps, a cause for some distress, the concurrent decline in unauthorized grievance strikes on balance may suggest reasons for optimism about the state of grievance dispute settlement under the Agreement. If coal miners are beginning to appreciate the merits of peaceful dispute resolution while arbitrators are consistently applying contractual rules that are accepted by both parties, the future may indeed be bright.[473]

This study has shown two salient features of coal arbitration. First, the idiosyncratic features of the industry, notably the omnipresence of hazard and unpredictability of work stoppages, have influenced arbitral reasoning and outcomes. This can clearly be seen in a variety of discipline and discharge cases and in safety cases. Second, clear lines of authority have evolved to govern most issues that arise under the Agreement. Much of the credit for this clarity must be attributed to the grievance arbitration procedures established under the 1974 Agreement. Though the ARB no longer exists, its influence continues to be seen in the writing of panel arbitrators. It is also clear that the procedure for selecting panel arbitrators under the Coal Agreement has led to an arbitral quality that compares quite favorably with other industries.

472. *See* Lab. Arb. (BNA) vols. 64-94; Lab. Arb. (CCH) vols. 74-2 to 90-1.

473. Indeed, the most recent figures show a marked decline in the number of arbitrations filed. Under the 1988 Agreement, 1,900 arbitrations were filed as of March 1, 1991, the third anniversary of the Agreement. Compared to earlier Agreements where 3,000 (1974 and 1978 Agreements), 5,200 (1981 Agreement), and 3,700 (1984 Agreement) were filed. Interview with Steven W. Lindner, UMWA, Department of Contract Services (March 1, 1991).

APPENDIX I
ARBITRATION FREQUENCY AND SUCCESS RATES UNDER THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT BETWEEN 1974 AND 1990

GRIEVANCE	NUMBER	(% OF TOTAL)*	SUSTAINED	(PERCENTAGE)*
(1) DISCIPLINE AND DISCHARGE	74	(20.1)	45	(60.8)
Attendance	22		12	(54.51)
Work Stoppage	5		2.5	(50)
Insubordination	4		3.5	(87.5)
Alcohol and Drugs	4		.5	(12.5)
Unsafe Performance	4		3	(75)
Unsatisfactory Performance	4		4	(100)
Negligence	3		2	(66.7)
Other	28		17.5	(62.5)
(2) COMPENSATION	58	(15.7)	28	(48.2)
Holiday Pay	12		5	(46.6)
Reporting Pay	8		5	(62.5)
Bereavement Pay	5		3	(60)
Benefits	4		2	(50)
Travel Expenses	2		0	(0)
Granted Injury Pay	2		1	(50)
Side Agreements-Wages	2		1	(50)
Other	23		11	(47.8)
(3) WORK ASSIGNMENT	58	(15.7)	23.5	(40.5)
Subcontracting	30		9.5	(31.6)
Supervisory Performance-Unit Work	11		7	(63.6)
Jurisdictional Disputes	8		2	(25)
Other	9		5	(55.5)
(4) SENIORITY	52	(14.1)	18	(29.5)
Job Vacancies	18		3	(16.7)
Recall	11		5	(45.5)
Layoff	8		3	(37.5)
Job Postings	8		5	(62.5)
Other	7		2	
(5) HOURS	31	(8.4)	9	(29)
Scheduling Idle Work	12		3.5	(29.2)
Scheduling Work	7		2	(28.6)
Overtime	7		3	(42.9)

Scheduling Vacation Days	5		.5	(10)
(6) SAFETY	17	(4.6)	7.5	(44.1)
Removal from MHSC	3		1	(33.3)
Individual Safety Rights	3		1	(33.3)
Bomb Threat Absenteeism	2		0	(0)
Other	9		5.5	(61.1)
(7) REASONABLE WORK RULES	13	(3.5)	11	(73.3)
New Attendance Programs	4		2	(50)
Drug Testing	4		3	(75)
Unexcused Absences Policy	1		1	(100)
Other	4		3	(75)
(8) HEALTH	13	(3.5)	6	(46.1)
Insurance Benefits	9		5	(55.6)
Ability to Return to Work	2		1	(50)
Other	2		0	(0)
(9) PROCEDURAL ISSUES	10	(2.7)	2	(20)
(10) MANAGEMENT RIGHTS	9	(2.4)	4	(44.4)
(11) WORKING CONDITIONS	8	(2.2)	3	(37.5)
(12) ARBITRABILITY	8	(2.2)	3	(37.5)
(13) SUCCESSORSHIP	6	(1.6)	0	(0)
(14) DISCRIMINATION	5	(1.4)	3	(60)
(15) UNION SECURITY	4	(1.1)	4	(100)
(16) MISCELLANEOUS	2	(.54)	1	(.50)
TOTAL	368		166	(45.1)

* Percentages are rounded to nearest tenth.

Source: Labor Arbitration Reports Vols. 64 to 94 (BNA); Labor Arbitration Awards Vols. 74-2 to 90-1 (CCH).

APPENDIX II*

HISTORICAL TRENDS IN BITUMINOUS COAL MINING

Year	Production (million tons)	Employment	Productivity (tons/workday
1950	516.3	415,582	6.77
1951	533.7	372,897	7.04
1952	466.8	335,217	7.47
1953	457.3	293,106	8.17
1954	391.7	227,397	9.47
1955	464.6	225,093	9.84
1956	500.9	228,163	10.28
1957	492.7	228,635	10.59
1958	410.4	197,402	11.33
1959	412.0	179,636	12.22
1960	415.5	169,400	12.83
1961	403.0	150,474	12.83
1962	422.1	143.822	14.72
1963	458.9	141,646	15.83
1964	487.0	128,698	16.84
1965	512.1	133,732	17.52
1966	533.9	131,752	18.52
1967	552.6	131,523	19.17
1968	545.2	127,894	19.37
1969	560.5	124,532	19.90
1970	602.9	140,140	18.84
1971	552.2	145,664	18.02
1972	595.4	149,265	17.74
1973	591.7	148,121	17.58
1974	603.4	166,701	17.58
1975	648.4	189,880	14.74
1976	678.7	202,280	14.46
1977	688.6	214,777	14.74
1978	653.8	221,000	14.56
1979[1]	770.0	243,923	14.56

[1] Preliminary

Sources:

1947-1975 — U.S. Department of the Interior, Bureau of Mines, *Minerals Yearbook*, "Bituminous Coal & Lignite," Annual.

1976-1978 — U.S. Department of Energy, Energy Information Administration, *Energy Data Report*, "Weekly Coal Report."

1979 Production data — U.S. Department of Energy, Energy Information Administration *Energy Data Report*, "Weekly Coal Report."

1979 Employment data — U.S. Department of Labor, Mine Safety and Health Administration, *Mine Injuries & Worktime Quarterly*, January-December, 1979.

*President's Commission on Coal (PCOC), *Staff Findings*, p. 47 (1980).

APPENDIX III*

UNITED MINE WORKERS OF AMERICA
SHARE OF PRODUCTION
(Millions of Tons)

Year	Total Bituminous Production	UMWA Percent Share of Production	UMWA Tons Produced[1]
1951	534	78.5[2]	419[2]
1967	553	73.6	407
1968	545	72.7	396
1969	561	72.0	404
1970	603	70.3	424
1971	552	65.6	362
1972	595	70.6	420
1973	592	69.1	409
1974	603	64.8	391
1975	648	62.0	402
1976	679	58.6	398
1977	689	52.1	359

[1] National Bituminous Coal Wage Agreement Tonnage, 1951-1977, and Western Surface Agreement Tonnage, 1972-1977.
[2] Estimate based upon 1951-1955 average share.
Source: BCOA.

* PCOC, *Staff Findings*, p. 52 (1980).

APPENDIX IV*

FREQUENCY AND SEVERITY OF DISABLING INJURIES IN SELECTED INDUSTRIES, 1978

Industry	Incidence Rate[1]	Lost Workdays Per Injury[2]
Lumber and Wood Products	11.0	16
Underground Coal	10.4	34
Trucking and Warehousing	9.3	19
Water Transportation	7.7	35
All Coal	7.6	33.5
Construction	6.3	17
All Manufacturing	5.4	15
Surface Coal	3.5	33

[1] Lost workday cases per 200,000 work hours.
[2] Total lost workdays per 200,000 work hours divided by incidence rate.
Sources: U.S. Department of Labor,
Occupational Safety and Health Administration.
U.S. Department of Labor,
Mine Safety and Health Administration.

* PCOC, *Staff Findings*, p. 34 (1980).

APPENDIX V*

EXPLOSIONS, FATALITIES, AND PRODUCTION IN UNDERGROUND MINING 1960-1969 AND 1970-1979

	Production (millions of tons)	"Major" Mine Explosions[1]	Fatalities Due To Explosions	Total Underground Fatalities
1960-1969	5,041.4	10	258	2,383
1970-1979	6,455.2	3	78	1,210

[1] Single accidents in which five or more fatalities occurred.

Sources: U.S. Department of Energy, Energy Information Administration.

U.S. Department of the Interior, Bureau of Mines.

U.S. Department of the Interior, Mine Enforcement and Safety Administration.

U.S. Department of Labor, Mine Safety and Health Administration.

* PCOC, *Staff Findings*, p. 37 (1980).

APPENDIX VI*

WORKDAYS AND PRODUCTION LOST TO WILDCAT STRIKES IN THE BITUMINOUS COAL INDUSTRY 1956-1979

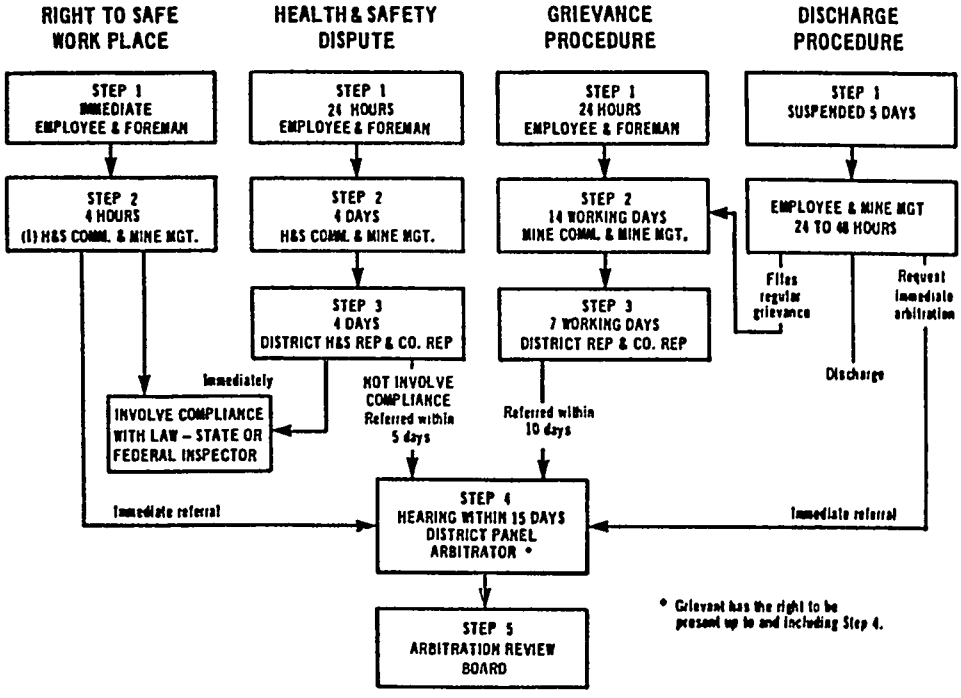
Year	Workdays Lost	Estimated Tonnage Lost
1956	190,600	2,056,300
1957	76,900	816,500
1958	61,500	827,900
1959	58,800	866,500
1960	58,400	818,100
1961	24,700	412,800
1962	46,000	717,100
1963	40,200	717,300
1964	129,800	2,258,800
1965	161,700	3,274,600
1966	485,800	10,285,100
1967	109,500	2,116,300
1968	630,700	13,025,500
1969	626,500	12,073,900
1970	593,100	11,388,600
1971	565,000	8,762,100
1972	515,600	8,372,100
1973	529,200	7,043,000
1974	1,023,800	11,687,000
1975	1,417,400	15,826,000
1976	1,950,300	20,477,000
1977	2,283,400	22,176,100
1978	229,500	3,641,000
1979	315,900	4,648,000
TOTAL	12,123,300	164,556,600

Source: Bituminous Coal Operators' Association.

* PCOC, *Staff Findings*, p. 48 (1980).

APPENDIX VII*

GRIEVANCE PROCEDURES**



* PCOC, *Coal Data Book*, p. 149 (1980).
** United Mine Workers of America and Bituminous Coal Operators Association.

Source: Joint Industry Training Committee.
** PCOC, *Coal Data Book*, p. 149 (1980).

Individual Safety Rights Dispute Settlement. Article III, Section (i); Article XXIII, Section (c)(3) and (4).

Mine Health or Safety Dispute - Article III, Section (p); Article XXIII, Section (c)(4). Note that Step 3 is deleted from subsequent agreements.

Grievance Procedure Article XXIII, Section (c). Agreements after 1974 reduced the number of days in Step 2 from 14 to 10.

Discharge Procedure. Article XXIV, Sections (b), (c) and (d). Note that district arbitrator must hear discharge cases, immediately arbitrated within 5 days of the request (Section (d)). Also the ARB was discontinued after the 1978 Agreement.